TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 242.

JOHN NOYES, APPELLANT,

vs.

LEE MANTLE AND PATRICK LARGEY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED JULY 6, 1888.

III.

If the defendants have not waived the right to object to the transcript as certified, their proper remedy is by *certiorari*, and not by motion to dismiss the appeal.

Rule 14.

Hudgins *et al. v.* Kemp, 18 Howard, 530.

Clark *v.* Hackett, 1 Black, 77.

Stearns *v.* United States, 4 Wall., 1.

The Rio Grande, 19 Wall., 178.

Mo., K. & T. Co. *v.* Dinsmore, 108 U. S., 30.

Those representing the United States in this case have not been wanting in honesty or fairness respecting the record, and have no objection to the defendants producing any paper filed in the case which they desire, but it is denied that appellants should, in view of the facts stated and the practice in similar cases, be either required to supply omissions or have their appeal dismissed.

Respectfully submitted.

HENRY M. BAKER,
Attorney for Appellant.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, NOVEMBER 25, 1887.

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1 Pleas in the district court of the second judicial district of Montana Territory in and for the county of Silver Bow, at a term begun and holden on the — day of ——, 1882, before the Hon. Wm. J. Galbraith, judge of the second judicial district.

LEE MANTLE and PATRICK A. LARGEY, Plaintiffs,
vs.
JOHN NOYES, Defendant. } Cause No. 116.

Be it remembered that heretofore, to wit, on the 14th day of September, A. D. 1882, there was filed in the office of the clerk of the district court of the second judicial district in and for the county of Silver Bow and Territory of Montana, a petition, which is in the words and figures following, to wit:

In the District Court of the Second Judicial District of Montana Territory in & for the County of Silver Bow.

LEE MANTLE & PATRICK A. LARGEY, Plaintiffs,
vs.
JOHN NOYES, Defendant.

2 The above-named plaintiffs complain of the above-named defendant, and for cause of action allege—

1st. That the plaintiffs are citizens of the United States, and that they are now, and they and their grantors and predecessors in interest under and through whom they claim have been continuously since the 23rd day of April, A. D. 1878, the owners against all persons except the Government of the United States and entitled to and in the possession of that certain quartz lode mining claim situated in Summit Valley mining district, in the county of Silver Bow and Territory of Montana, just southeasterly of the town of Butte and about one-half mile south of A. J. Davis' Lexington quartz mill, which was discovered, located, and claimed on the 23rd day of April, A. D. 1878, by Daniel Zinn and John O. McEwan, and recorded in Book J of lode locations, page 536, records of Deer Lodge county, Montana Territory, and afterwards, on the 2d day of August, A. D. 1881, relocated—without waiving any right under the said first location—by these plaintiffs, who were and are the grantees of said Zinn and McEwan, and recorded in the county recorder's office of said Silver Bow county, Montana Territory, and which was and is

3 known as and called the "Pay Streak" quartz lode mining claim, and more particularly described by survey thereof as follows, to wit: Beginning at corner No. 1 (being the southwesterly corner of said claim), and from which corner No. 1 the section corner of sections 24, 25, 19, & 30, in township three (3) north, range 7 & 8 west (according to United States survey), bears south 29° 55′ east 839 feet distant; thence from said corner No. 1 north 70° 50′ west 508 feet to corner No. 2, being the northwesterly corner of said claim; thence south 75° 55′ east 874 feet to corner No. 3, being the northeasterly corner of said claim; thence south 70° 50′ east 508 feet to corner No. 4, being the southeasterly corner of said claim; thence

north 75° 55′ west 874 feet to corner No. 1 and place of beginning, said claim extending along said Pay Streak vein or lode 245 feet in an easterly direction and 629 feet in a westerly direction from the center discovery shaft on said claim, and being 300 feet in width on the southerly side and 208 feet in width on the northerly side from the middle or center of said lode or vein on the surface, comprising in all 874 feet in length along said vein or lode and 500 feet
4 in width, and the location being distinctly marked on the ground so that its boundaries can be readily traced, together with all of the rights, privileges, and appurtenances of any kind belonging or in anywise appertaining to the said vein or lode and claim.

2. That the said defendant, John Noyes, claims some estate or interest adverse to plaintiffs in or to the said Pay Streak quartz lode mining claim above described, and said estate or interest, as plaintiffs are informed and beleive, is claimed by said defendant under or by virtue of some alleged or pretended patent from the United States to said defendant purporting to convey certain pretended placer mining ground including within its limits the Pay Streak quartz lode and claim aforesaid.

3. That any estate or interest claimed by defendant in or to said Pay Streak lode claim above described under any alleged patent for placer mining ground from the United States or otherwise is invalid and of no effect as against the right and title of plaintiffs thereto, and is without foundation in law or fact, and defendant is
5 estopped in law and equity to claim any right of possession to said lode claim, for that the said Pay Streak lode or vein of plaintiffs was a vein or lode of quartz or rock in place bearing silver and other valuable mineral deposits and was known to exist, and the said Pay Streak lode claim of plaintiffs was located thereon, within the boundaries of the alleged placer claim for which defendant made application for the patent from the United States under which, as plaintiffs are informed and believe, he now claims said lode claim, at and before the time when defendant made application for patent for said alleged placer ground, and defendant did not, in or with his said application, make any statement that said placer claim included said "Pay Streak" or any other vein or lode of quartz or other rock in place bearing silver and other valuable metals or mineral deposits, nor did he apply for patent for or pay for any vein or lode, although said "Pay Streak" vein and lode and claim was known to exist within the boundaries of defendant's alleged placer claim at and before the time when he applied for patent therefor.

6 4. That, notwithstanding the premises, the acts of defendant in claiming an estate and interest adverse to plaintiffs in and to said "Pay Streak" lode claim under defendant's alleged patent and otherwise cast a cloud upon plaintiffs' right and title in and to their said lode claim, and greatly interfere with and injure plaintiffs in their use and enjoyment thereof.

Wherefore plaintiffs ask the aid of this court in the premises, and that the defendant appear herein and set out by answer fully and particularly the nature and character of the estate or interest

claimed by him adversely to plaintiffs in or to the "Pay Streak" quartz lode mining claim above described; that defendant be decreed and adjudged to have no estate or interest therein or thereto as against plaintiffs; that plaintiffs be adjudged and declared to be the owners and entitled to the possession of said lode claim, and the right of possession thereof be decreed to be in plaintiffs; that plaintiffs' right and title thereto be established and quieted, and that defendant be perpetually enjoined and restrained from further or hereafter asserting or claiming any estate, right, title, or interest in or to said lode claim as against plaintiffs, and that plaintiffs have such other and further relief in the premises as the nature
7 and circumstances of the case may require and as to equity belongs, and to recover of defendant their costs of this action.

(Signed) W. W. DIXON,
Att'y for Pl'ffs.

TERRITORY OF MONTANA, } ss:
County of Silver Bow, }

Lee Mantle, being first duly sworn, says that he is one of the plaintiffs in the above-entitled action; that he has heard read the foregoing complaint, and that the facts therein stated are true to his own knowledge, except as to those matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.

(Signed) LEE MANTLE.

Subscribed and sworn to before me 13th day of September, A. D. 1881.

[L. S.] A. C. WITTER, *Co. Clerk,*
By H. C. BODLEY, *Deputy.*

And afterwards, to wit, on the — day of ——, A. D. 1881, a summons was issued in the above-entitled cause, which was returned duly executed on the — day of ——, A. D. 1881.

8 And afterwards, to wit, on the 1st day of October, A. D. 1881, there was filed herein a demurrer to the plaintiffs' declaration, which said demurrer is in the words and figures following, to wit:

In the District Court, 2d Judicial District, Silver Bow County, Montana Territory.

LEE MANTLE & PARTICK A. LARGEY, Plaintiffs,
vs.
JOHN NOYES, Defendant.

Now comes the above-named defendant (by consent of counsel for plaintiff-) and files this his demurrer to plaintiffs' complaint, and as grounds thereof assigns—

1. That said complaint does not state facts sufficient to constitute a cause of action.

2. That said complaint is ambiguous, uncertain, and unintelligible, in that, 1st, it does not specify the width on each side of the lead itself that is claimed as surface ground, nor does it state the course of the vein so that the amount of surface ground could be ascertained.

3. That it does not state by whom the Pay Streak lode was known to exist, whether by defendant, by the community at large,
9 or by some individual or by the applicant for and patentee with his witnesses at the date of the application for patent.

4. That there is no proper party plaintiff.

Defendant asks judgment for his costs herein.

SPRATT & STAPLETON AND
THOS. L. NAPTON,
Att'ys for Defendant.

And afterwards, to wit, on the 16th day of February, A. D. 1882, it being the — judicial day of the —— term of said district court, the following further proceedings were had in said cause, to wit:

LEE MANTLE and PATRICK A. LARGEY, Plaintiffs,
vs.
JOHN NOYES, Defendant. } Case No. —.

Demurrer overruled and defendant excepts.

And afterwards, to wit, on the 20th day of February, A. D. 1882, the defendant filed herein his answer, which is in the words and figures following, to wit:

10 In the District Court, 2d Judicial District, Silver Bow County, Montana Territory.

LEE MANTLE and PATRICK A. LARGEY, Plaintiffs,

vs.

JOHN NOYES, Defendant.

Now comes the above-named defendant, and for answer to the complaint of plaintiffs herein, denies—

1st. That plaintiffs now are or that they or their grantors or predecessors in interest have been since the 23d day of April, 1878, or at any time the owners of or entitled to the possession of the property described in plaintiffs' complaint as the "Pay Streak quartz lode mining claim" or any part or parcel thereof.

2. That plaintiffs now are or they or their grantors or predecessors in interest ever have been the owners of, possessed of, or entitled to the possession of the property described in their complaint or any part thereof.

Defendant denies that John Zinn and John O. McEwan or either of them at any time located or claimed the property described in plaintiffs' complaint or any part thereof; denies that plaintiff at any time relocated or claimed said property or any part thereof.

11 Defendant denies that there has been at any time or now is any quartz lode, vein, or mining claim situated within the limits of the ground described in plaintiffs' complaint or any part thereof. Defendant denies that plaintiffs relocated or claimed the property herein sought to be recovered on the 2nd day of August, 1881, or at any other time, or that they did not waive any rights thereby to the Zinn and McEwan location in April, 1878.

Defendant denies that there has been at any time or is now any vein or lode claims of quartz known as the "Pay Streak" or otherwise discovered, located, claimed, or recorded within the limits of the property described in plaintiffs' complaint.

Defendant denies that the "Pay Streak" lode claim or vein of plaintiffs was a vein or lode of quartz or rock in place bearing silver or other valuable mineral deposits at the date of defendant's application for patent to the ground in controversy, or that any such vein or load claim was known to exist at said date or is now known to exist. Defendant denies that said "Pay Streak" lode claim of plaintiffs or any part of it was located or known to exist at the

12 date of defendant's application for patent or at the date of its procurement or issuance.

And defendant, for a further and separate defense to plaintiffs' action, avers the facts to be that this defendant now is the owner of, in the possession of, and entitled to the possession of all that tract of land described in plaintiffs' complaint, and he and his grantors and predecessors have been since the year 1867; that heretofore, to wit, on or about the 14th day of December, A. D. 1878, this defendant duly applied in the United States Land Office for a patent to said ground for placer mining purposes, and after giving due notice, as required by law, the Government of the United States, on the 28th day of July, 1880, duly granted and executed to defendant its patent therefor, by the terms of which it granted to defendant the said tract of land for placer mining purposes and all leads or lodes therein containing silver or valuable mineral deposits except those known to exist at the date of said application for patent; and defendant avers that said vein or lode claim described in plaintiffs' complaint was not then known to exist, and defendant thereby became the absolute owner thereof if any such lead of lode claim — thereby.

13 Defendant, for a further answer, avers the facts to be that plaintiffs' cause of action is barred by the provisions of section thirty-two of the code of civil procedure.

Defendant, for a further answer, avers the facts to be that this defendant and his grantors and predecessors in interest have been in the actual, peac-able, and adverse possession of said tract of land described in plaintiffs' complaint for more than two years before the commencement of this action, and plaintiffs are thereby estopped from claiming any right thereto.

Defendant, having fully answered, asks judgment for his costs herein.

STAPLETON AND NAPTON,
Atty's for Defendant.

TERRITORY OF MONTANA, } ss:
County of Silver Bow, }

Thomas L. Napton, being duly sworn, says that he is of attorney for defendant; that defendant is absent from the Territory of Montana, and for that reason affiant make this affidavit; that he has read the foregoing answer, and the facts therein stated are true to his best knowledge, information, and belief.

(Signed) THOMAS L. NAPTON.

14 Subscribed and sworn to before me this 20th day of February, 1882.

(Signed) GEORGE W. IRVINE, II, *Clerk.*

And afterwards, to wit, on the 2nd day of March, A. D. 1882, it being the — judicial day of the spring term of said district court, the plaintiff- filed herein their demurrer to a portion of defendant's answer, which said demurrer is in the words and figures following, to wit:

In the District Court, 2d Judicial District, Montana Territory, Silver Bow County.

LEE MANTLE and PATRICK A. LARGEY, Plaintiffs,

versus

JOHN NOYES, Defendant.

Now comes the said plaintiffs, by their attorney, and demur—

1st. To all that portion of the answer of defendant herein filed which is contained in the third page of said answer and purports to be a further and separate defense, and for ground of demurrer state that said portion of said answer does not state facts sufficient to constitute a defense or counter-claim.

15 2. And plaintiffs further and separately demur to all that portion of said answer on the third page commencing at the top of the page and ending with the figures 1867, in the fifth line of said page, and for ground of demurrer state that said portion of said answer does not state facts sufficient to constitute a defense or counter-claim.

3. And plaintiffs further and separately demur to all that portion of said answer which is contained in the first paragraph on the fourth page of said answer and purports to be a further answer, and for ground of demurrer state that said portion of said answer does not state facts sufficient to constitute a defense or counter-claim.

4. And plaintiffs further and separately demur to all that portion of said answer which is contained in the second paragraph on the fourth page of said answer and purports to be a further answer, and for ground of demurrer state that said portion of said answer does not state facts sufficient to constitute a defense or counter-claim.

(Signed) W. W. DIXON,
Att'y for Pl'ffs.

16 And afterwards, to wit, on the 27th day of March, A. D. 1882, it being the — judicial day of the —— term of said district court, the following further proceedings were had in said cause, to wit:

LEE MANTLE and PATRICK LARGEY, Plaintiffs,

vs.

JOHN NOYES, Defendants.

Plaintiffs demurrer to portion of defendant's answer withdrawn.

And afterwards, to wit, on the 27th day of March, A. D. 1882, there was filed herein by plaintiffs a replication to defendant's answer, which said replication is in the words & figures following, to wit:

In the District Court, Second Judicial District of Montana Territory in & for the County of Silver Bow.

LEE MANTLE & PATRICK A. LARGEY, Plaintiffs,

vs.

JOHN NOYES, Defendant.

Now comes the above-named plaintiffs, and for replication to the answer of defendant herein filed deny that defendant now is or ever was the owner of, in possession of, or entitled to the possession of all or any part of the tract of land described in plaintiffs' complaint, and deny that defendant or his grantors or predecessors have been since the year 1867 or since any other time.

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Plaintiffs, further replying, deny that the said vein or lode claim described in plaintiffs' complaint was not known to exist at the time of defendant's application for patent referred to in his answer, and aver that it was so known to exist at said time, and deny that defendant, by said patent or otherwise, became the absolute or other owner thereof; and plaintiffs, for further replication to said answer, deny that plaintiffs' cause of action is barred by the code of civil procedure; and plaintiffs, for further replication to said answer, deny that defendant or his grantors or predecessors in interest or any of them have been in the actual or peaceable or adverse possession of the tract of land described in plaintiffs' complaint or any part of it for more than ten or any other number of years or for any period of time before the commencement of this action, and deny that plaintiffs are thereby or at all estopped from claiming any right thereto.

18 Plaintiffs reaffirm each and every allegation of their complaint and ask decree and relief as therein demanded.

W. W. DIXON,
Att'y for Pl'ffs.

And afterwards, to wit, on the 26 day of September, A. D. 1882, the following further proceedings were had in said cause, to wit:

LEE MANTLE & PATRICK A. LARGEY, Plaintiffs,

vs.

JOHN NOYES, Defendant.

Jury instructed and retire; defendant's exceptions to instructions filed.

Which said instructions to the jury given by the court for the plaintiffs are in the words and figures following, to wit:

In District Court, 2nd Judicial District, Silver Bow County, M. T.

LEE MANTLE *et al.*, Plaintiffs, *vs.* JOHN NOYES, Defendant.

In this action the court instructs the jury as to the law as follows:

19 1. A vein or lode or such as is authorized to be located under the laws of the United States and of the Territory of Montana is a seam or fissure in the earth's crust filled with quartz or with some other kind of rock in place carrying or bearing gold, silver, or other valuable mineral deposits. It may be very thin or it may be many feet thick or thin in places, almost or quite pinched out, in miners' phrase, and in other places widening out into extensive lodes of ore. So, also, in places it may be quite or nearly barren and at other places immensely rich. It is only necessary to discover a genuine mineral vein or lode, whether small or large, rich or good, at the point of discovery within the lines of the claim located to entitle the miner to make a valid location, including the vein or lode. It may, and often does, require much time and labor and great expense to develop a vein or lode after discovery and location sufficiently to determine whether there is a really valuable mine or not, and a location would be necessary before incurring such expense in developing the vein to secure to the miner the fruits of his labor and expense in case a rich mine should be developed.

20 If, then, Zinn & McEwan, in April, 1878, or at any time before the 14th day of December, 1878, discovered such a mineral vein or lode as is above described, however small or however poor (provided it contained any gold, silver, or other valuable deposits), before the location of the "Pay Streak" claim or afterwards, if before the 14th day of December, 1878, and within the lines of that claim, the location of said claim by them was in this particular valid; otherwise not. Given.

2. To make a valid location under the statute it is required that the location must be distinctly marked on the ground so that its boundaries can be readily traced, but the law does not define or prescribe what kind of marks shall be made or upon what part of the ground or claim they shall be placed. Any marking on the ground claimed by stakes and mounds and written notices whereby the

boundaries of the claim located can be readily traced is sufficient. Given.

The exceptions by defendant to said instructions so given by the court on the part of plaintiffs were filed on the 26th day of September, A. D. 1882, and are in the words and figures following, to wit:

21 In District Court, 2d Judicial District, Silver Bow County, Montana Territory.

PATRICK A. LARGEY *et al. vs.* JOHN NOYES.

Now comes said defendant, before said cause was submitted to the jury, after reading to the jury the instructions, and excepts to the giving of each and every instruction given at the request of plaintiff- and each part of each of said instructions, and except- to the refusal of the court to give each instruction offered by defendant and refused.

T. L. NAPTON & ROBINSON & STAPLETON,
Att'ys for Defendant.

And upon the 25th day of September, A. D. 1882, the defendant filed herein a bill of exceptions, which is in the words and figures following, to wit:

In District Court, 2d Judicial District, Silver Bow County, Montana Territory.

LEE MANTLE & PATRICK A. LARGEY *vs.* JOHN NOYES.

22 At the trial of said cause said plaintiffs, in order to establish their title to the premises in dispute under a location thereof by one Daniel Zinn and —— McEwan as the Pay Streak lode, proved the discovery of a mineral-bearing lode, as required by law, and proved by said Zinn and McEwan that they in locating said Pay Streak lode set one stake at the discovery shaft thereof, with notice thereon describing its boundaries in length and width, and set a stake at each corner thereof about two feet high and 4 or 5 inches in diameter, and said claim was 1,051 feet long and 309 feet on each side of said lode or vein, and which was the only marking of boundaries said parties did in locating the same, and upon which plaintiffs then offered in evidence the record of location of said claim filed in the office of the county recorder of Deer Lodge Co., M. T., where said property was situated, and which was objected to by defendant for the reason that there was no proof of a sufficient staking off or marking the boundaries of said Pay Streak lode, as required by law, and which was the only marking of its boundaries at the time of the original location thereof proven by plaintiffs, and
23 which said objection was then and there overruled, and said ruling then and there duly excepted to by defendants and noted, and said record was then introduced in evidence.

Dated Oct. 16, 1882.

(Signed) WM. J. GALBRAITH, *Judge.*

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And afterwards, to wit, on the 26 day of September, A. D. 1882, the following further proceedings were had in said cause, to wit:

LEE MANTLE and PATRICK A. LARGEY, Plaintiffs,
vs.
JOHN NOYES, Defendant.

Instructions and interrogatories refused filed, which said instructions asked by defendant and refused are in the words and figures following, to wit:

If the jury should find that plaintiffs are the owners of the lead described and it was a lead known to exist at the date of defendant's application for patent, then you can only find for plaintiffs 25 feet on each side thereof. Refused.

That if there was no vein or lode known to defendant or
24 which could have been known to him, by reasonable examination of the premises, to exist or be on said premises when the defendant applied for and obtained his patent, then his patent would convey him a title to any vein or lode therein, and if the jury so find from the evidence the- will find for defendant, if they further find defendant obtained such patent.

3. If plaintiffs or their grantors ever acquired any valid right or title to said Pay Streak lode by its location, then, if such claim was abandoned by them, they cannot recover, and such abandonment may have been of the entire claim, both vein and surface ground, or of either vein or surface ground, without abandoning the other; and an abandonment is the voluntary act of a party leaving the premises or any part thereof without the intention of retaining it, and which fact of abandonment is a question for the jury to determine from the evidence, and so determining may take into consideration all the acts of plaintiffs and facts and circumstances testified to by any of the witnesses.

25 And afterwards, to wit, on the 26th day of September, A. D. 1882, the defendant filed herein his interrogatories to the jury, which were by the court refused and which are in the words & figures following, to wit:

In District Court, &c.

PATRICK A. LARGEY *et al. vs.* JOHN NOYES.

Instead of plaintiffs' 6th question the following is submitted for the jury to answer:

"What did Zinn & McEwan do as to marking the boundaries of the Pay Streak lode when they claim to have located the same in April, 1878?

Answer. —. Refused.

And instead of plaintiffs' 11th question answer the following:

What did plaintiffs do or cause to be done on August 2, 1881, as to marking the boundaries of the Pay Streak lode?

Answer. —. Refused.

And afterwards, to wit, on the 27th day of September, A. D. 1882, the following further proceedings were had in said cause, to wit:

26 *Findings of Jury Filed and Entered.*

LEE MANTLE *et al.*, Plaintiffs, *vs.* JOHN NOYES, Defendant.

Which said findings of the jury are in the words and figures following, to wit:

In the District Court, 2nd Judicial District of Montana Territory, in & for Silver Bow County.

LEE MANTLE *et al.*
vs.
JOHN NOYES. } No. 116.

In this action the jury will find upon the following questions of fact and answer the same, to wit:

1. Was there, at any time on or before the 14th day of December, 1878, a vein or lode of quartz or other rock in place bearing any gold or silver whatever known to any person to exist within the limits of the ground in controversy in this action?

Answer. Yes.

(Signed) WM. McNAMARA, *Foreman.*

2d. If such vein or lode did exist, could its existence have been ascertained on or prior to the 14th day of December, 1878, by
27 a person examining the ground with an honest endeavor to ascertain if it contained any such vein or lode?

Answer. Yes.

(Signed) WM. McNAMARA, *Foreman.*

3. Did Zinn & McEwan or either of them, in the month of April, 1878, discover, within the limits of the ground in controversy in this action, a vein or lode of quartz or other rock in place, with at least one well-defined wall, and bearing any gold or silver whatever?

Ans. Yes.

WM. McNAMARA, *Foreman.*

4. Did said Zinn & McEwan or either of them, in the month of April, 1878, and at or about the time they claim to have discovered a vein or lode, post upon the ground in controversy in this action a notice claiming the ground in controversy or ground including it as a lode mining claim?

Ans. Yes.

WM. McNAMARA, *Foreman.*

5. Was such notice, if one was posted, a copy of the paper introduced in evidence by plaintiffs as the recorded notice and claim of Zinn & McEwan to the "Pay Streak" lode claim?

Ans. Yes.

WM. McNAMARA, *Foreman.*

28 6. Did Zinn & McEwan or either of them, in the month of April, 1878, and at or about the time they claim to have discovered a vein or lode, distinctly mark on the ground, by stakes or otherwise, the location claimed by them as the Pay Streak lode, so that its boundaries could be readily traced?

Ans. Yes.

WM. McNAMARA, *Foreman.*

7. If said Zinn & McEwan or either of them did post such notice and mark their location as above mentioned, was such notice posted upon the ground claimed by them as the Pay Streak lode, and did the ground claimed by them include within its limits the vein or lode which they claimed to have discovered?

Ans. Yes.

WM. McNAMARA, *Foreman.*

8. Did said Zinn & McEwan or either of them, in the month of April, 1878, and within 20 days after they claimed to have discovered a vein or lode, make and file in the office of the recorder of Deer Lodge county the paper offered in evidence in this action as the notice and claim of location of the Pay Streak lode in April, 1878?

Ans. Yes.

WM. McNAMARA, *Foreman.*

29 9. Was the paper last referred to in form and substance such as was usually or commonly employed in Summit Valley mining district in April, 1878, in claiming and recording lode claims?

Ans. Yes.

WM. McNAMARA, *Foreman.*

10. Did the said Zinn & McEwan convey to the plaintiffs in this action, by deed, about the 12th day of July, 1881, their interest in the ground claimed as the "Pay Streak" lode claim in controversy in this action?

Ans. Yes.

WM. McNAMARA, *Foreman.*

11. Did the plaintiffs or either of them, on or about the 2nd day of August, 1881, and before the commencement of this action, cause or procure a survey to be made of the ground claimed by them as the Pay Streak lode claim, and mark or cause to be marked the location claimed by them distinctly on the ground, so that its boundaries could be readily traced?

Ans. Yes.

WM. McNAMARA, *Foreman.*

12. Did the plaintiffs or either of them, at or about the same time, post a notice on the ground so surveyed, claiming the same as the Pay Streak lode claim, and was such notice, if one was posted, a

copy or duplicate of the paper introduced in evidence by the
30 plaintiffs as their recorded notice and claim of relocation of the Pay Streak lode claim?

Ans. Yes.

WM. McNAMARA, *Foreman.*

13. Did plaintiffs or either of them, in the month of August, 1881, and within 20 days after the making of what they claim as their relocation, make and file in the office of the recorder of Silver Bow county the paper offered in evidence in this action by plaintiffs as their notice and claim of relocation of the Pay Streak lode claim, of date Aug. 2, 1881?

Ans. Yes.

WM. McNAMARA, *Foreman.*

14. Is the ground in controversy in this action the same claimed to have been surveyed and relocated by plaintiffs in August, 1881?

Ans. Yes.

WM. McNAMARA, *Foreman.*

15. Is the ground in controversy in this action the same or a part of the same which Zinn and McEwan claim to have located as the Pay Streak load in April, 1878?

Ans. Yes.

WM. McNAMARA, *Foreman.*

16. Did the ground claimed to have been surveyed and relocated by plaintiffs in August, 1881, include within its limits the place where Zinn & McEwan claim to have discovered a vein or lode in April, 1878?

Ans. Yes.

WM. McNAMARA, *Foreman.*

31 17. Were the employés or workmen of plaintiffs working upon the ground in controversy for plaintiffs on or about the 14th day of September, 1881, when this action was commenced?

Ans. Yes.

WM. McNAMARA, *Foreman.*

Did defendant, on the 14th day of April, 1878, apply for and on the 28th day of July, 1880, obtain a patent from the United States, including within its limits the ground in controversy?

Ans. Yes.

WM. McNAMARA, *Foreman.*

Was there any vein or lode known to defendant to exist within and upon the premises in controversy when he applied for or obtained his patent to said ground?

Ans. We cannot agree.

WM. McNAMARA, *Foreman.*

What is the actual width of the Pay Streak vein?
Ans. About four feet.

WM. McNAMARA, *Foreman.*

And afterwards, to wit, on the 16th day of October, A. D. 1882, the following further proceedings were had in said cause, to wit:

LEE MANTLE *et al.*, Pl'ffs, *vs.* JOHN NOYES, Def't.

Decree for plaintiffs submitted, signed, filed, and ordered
32 entered, which said decree is in the words and figures following, to wit:

In the District Court of the Second Judicial District of Montana Territory in & for the County of Silver Bow. September Term, 1882.

LEE MANTLE & PATRICK A. LARGEY, Plaintiffs,
vs.
JOHN NOYES, Defendant. } Case No. 116.

This action having been heretofore, at this September term, 1882, of this court, regularly tried before a jury upon special questions of fact and issues herein submitted to them by the court, and the jury having duly rendered and returned their answers and findings to the questions submitted to them (except their answer to one question, upon which, as also upon a general verdict, they reported that they were unable to agree), which are herein filed, and the court having received said findings and answers and discharged said jury; and thereafter plaintiffs having made their motion, which is herein filed, moving the court to adopt as the findings of the court the said findings or answers of the jury to the findings of fact and questions submitted to them as above stated, except that finding (being
33 the first one asked by defendant) which is as follows: "Did defendant, on the 14th day of April, 1878, apply for and on the 28th day of July, 1880, obtain a patent from the United States, including within its limits the ground in controversy?"
"Ans. Yes.

"WM. McNAMARA, *Foreman.*"

And instead of said finding for the court to find, according to the pleadings and the evidence, that the date when defendant applied for a patent from the United States was the 14th day of December, 1878; and for the court, upon the adoption of said findings of said jury, except the one above mentioned and a corrected finding as to the date of application for patent as above mentioned, to order and enter a decree for plaintiffs herein in accordance with the prayer of their complaint; and said motion of plaintiffs now coming on regularly to be heard this 16th day of October, 1882, in open court and having been argued by counsel—W. W. Dixon for the plaintiffs and Robinson and Stapleton and Thos. L. Napton for the defendant—and the court having considered the matter and examined the case

and being advised in the premises, it is ordered that said mo-
34 tion be sustained, and that the court does now here adopt as its own findings of fact in this action all of the findings and answers of the jury herein filed, except so much of the findings hereinabove recited as finds that the defendant applied for a patent from the United States, including within its limits the ground in controversy, on the 14th day of April, 1878, which part of said finding is set aside by the court as contrary to the pleadings and the evidence in the action, and instead thereof the court finds from the pleadings and evidence that the defendant applied for a patent from the United States, including within its limits the ground in controversy, on the 14th day of December, 1878, and obtained such patent on the 28th day of July, 1880. And it is now thereupon considered, adjudged, and decreed by the court that plaintiffs are the owners, except as against the Government of the United States, and entitled to the possession of that certain quartz lode mining claim situated in Summit Valley mining district, in the county of Silver Bow and Territory of Montana, just south of the town of Butte and about one-half mile south of A. J. Davis' Lexington quartz mill, which was discovered, located, and claimed on the 23d day of
35 April, 1878, by Daniel Zinn and John O. McEwan, and recorded in Book J of lode locations, page 536, records of Deer Lodge county, Montana Territory, and afterwards, on the 2nd day of August, 1881, relocated by the plaintiffs in this action (without waiving any rights under said first location, said plaintiffs being the grantees of said Zinn and McEwan), and recorded in the county recorder's office of said Silver Bow county, Montana Territory, and which was and is known as and called the Pay Streak quartz lode mining claim, and more particularly described by survey thereof as follows, to wit: Beginning at corner No. 1 (being the southwesterly corner of said claim), and from which corner No. 1 the section corner of sections 24, 25, 19 x 30, in township three (3) north, ranges 7 x 8 west (according to United States survey), bears south 29° 55′ east, 839 feet distant; thence from said corner No. 1 north 7° 50′ west 508 feet to corner No. 2, being the northwesterly corner of said claim; thence south 75° 55′ east 874 feet to corner No. 3, being the northeasterly corner of said claim; thence south 7° 50′ east 508 feet to corner No. 4, being the southeasterly corner of said claim; thence north 75° 55′ west 874 feet to corner No. 1 and
36 place of beginning, said claim extending along said "Pay Streak" vein or lode 245 feet in an easterly direction and 629 feet in a westerly direction from the centre of discovery shaft, on said claim, and being 300 feet in width on the southerly side and 208 feet in width on the northerly side from the middle or centre of said lode or vein on the surface, comprising in all 874 feet in length along said vein or lode and 508 feet in width, and the location being distinctly marked on the ground, so that its boundaries can be readily traced, and that the right of possession of said lode claim is in plaintiffs; that defendant has no title, estate, or interest in or to said lode claim as against plaintiffs; that the right and title of plaintiffs to said lode claim be established and quieted, and that defendant be

perpetually enjoined and restrained from further or hereafter arresting or claiming any estate, right, title, or interest in or to said Pay Streak lode claim as against plaintiffs, and that plaintiffs have and recover of defendant their (plaintiffs') cost of this action, taxed at thirty-two and $\frac{50}{100}$ dollars.

Dated this 16th day of October, A. D. 1882, & signed

WM. J. GALBRAITH, *Judge.*

37 And afterwards, to wit, on the 13th day of November, A. D. 1882, there was filed herein an order of the judge, which is in the words and figures following, to wit:

In the District Court, 2d Judicial District, Silver Bow County, Montana Territory.

LEE MANTLE and PATRICK A. LARGEY, Plaintiffs,
vs.
JOHN NOYES, Defendant. } No. 116.

It is ordered in the above cause that the defendant shall have a stay of proceedings upon giving the statutory undertaking in the sum of $1,000.00 during the pendency of his appeal to the supreme court, the undertaking and sureties to be approved by the clerk.

1st Nov. 1882.

WM. J. GALBRAITH,
Associate Justice of Sup. C't and Presiding in 2d Dist.

And afterwards, upon the same day, there was filed herein a notice of appeal, which said notice of appeal is in the words and figures following, to wit:

38 In the District Court, 2d Judicial District, Silver Bow County, Montana Territory.

LEE MANTLE & PATRICK A. LARGEY, Plaintiffs,

vs.

JOHN NOYES, Defendant.

To W. W. Dixon, Esq., att'y for plaintiffs, and the clerk of the above court:

You will hereby take notice that the defendant in the above cause appeals to the supreme court of Montana Territory from the judgment herein made and entered against him and from every part thereof and in favor of plaintiffs in the above-entitled court on the — day of October, 1882. Said appeal is based upon the judgment roll.

Dated this 13th day of Nov., A. D. 1882.

ROBINSON & STAPLETON,
THOS. L. NAPTON,
Att'ys for Def't.

Service accepted & copy waived this 13th day of Nov., 1882.
W. W. DIXON,
Att'ys for Pl'ffs.

39 And afterwards, to wit, on the same day, to wit, on the 13th day of November, A. D. 1882, there was filed herein an undertaking on appeal, which is in the words and figures following, to wit:

In the District Court, 2d Judicial District, Silver Bow County, Montana Territory.

LEE MANTLE and PATRICK A. LARGEY, Plaintiffs,
vs.
JOHN NOYES, Defendant.

Whereas the defendant in the above-entitled action is about to appeal to the supreme court of Montana Territory from a judgment entered against him in said action on the — day of October, A. D. 1882, for costs of suit and for the recovery of certain real property described in said judgment and to which reference is hereby made, now, therefore, in consideration of the premises and of such appeal, we, the undersigned, residents of the county of Silver Bow, Montana Territory, do hereby, jointly and severally, undertake and promise on the part of the appellant *and* that the said appellant will
40 pay all damages and costs which may be awarded against the defendant on appeal, not exceeding the sum of $300.00, to which amount we acknowledged ourselves, jointly and severally, bound.

And whereas the appellant is desirous of staying the execution of the said judgment so appealed from in so far as it relates to the possession of said land and premises herein in controversy, we do further, in consideration thereof and of the premises, jointly and severally, undertake and promise in the sum of one thousand dollars (it being the amount fixed by the judge of this court) that during the possession of such property by the appellant he will not commit or suffer to be committed any waste thereon, and if the judgment be affirmed or the appeal dismissed he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of the possession thereof, not exceeding the sum hereinbefore mentioned, and for the payment of said sum on the conditions herein mentioned we do, jointly and severally, undertake and promise and bind ourselves to pay.

Witness our hands and seals this 13th day of Nov'r, 1882.
DENNIS LEARY. [SEAL.]
OLIVER T. BLAINE. [SEAL.]

41 TERRITORY OF MONTANA, } ss:
County of Silver Bow, }

Dennis Leary and Oliver T. Blaine, being each duly sworn, says, each for himself, that he is a resident and householder in the county

& Territory aforesaid, and is worth double the amount stated in the foregoing undertaking in property situated in said county and Territory over and above his just debts and liabilities and exclusive of property exempt from execution.

DENNIS LEARY.
OLIVER T. BLAINE.

Subscribed & sworn to before me this 13th day of November, A. D. 1882.

[SEAL.] GEO. F. MARSH,
Notary Public.

42 In the Supreme Court of Montana Territory. January Term, A. D. 1883.

LEE MANTLE and PATRICK A. LARGEY, Respondents,
vs.
JOHN NOYES, Appellant.

Be it remembered that in the present term of January, A. D. 1883, the above-entitled cause was brought into this supreme court by virtue of an appeal from the judgment of the court below rendered and entered therein on the 16th day of October, 1882, and the transcript of the record of the court below in said cause was duly filed.

And afterwards, to wit, in the August term, 1884, of this court said cause came regularly on for hearing on appeal before the court, and was argued by counsel. Thereupon the court took the same under advisement.

And afterwards, in the January term, 1885, of this court, said cause coming — for decision and judgment on appeal, the court delivered its opinion in writing in said cause, of which the following is a copy, to wit:

43 3. Same—protest—adverse claim. The prior patentee of a lode claim need not, in order to preserve his title, file a protest or adverse claim to the application of another to the property embraced in his patent.

Appeal from second district, Silver Bow county.

Thomas L. Napton and J. C. Robinson, for appellant; W. W. Dixon, for respondents.

WADE, *C. J.:*

This is an action in equity to quiet title. The respondents claim the ground in question, under the name of the "Pay Streak quartz lode mining claim," by virtue of a location thereof, according to law, on the twenty-third day of April, 1878, under the act of Congress of May 10, 1872. The appellant having, on the twenty-third

day of July, 1880, procured a patent from the Government for a certain placer mining claim under the same act of Congress by virtue of his application of December 14, 1878, which includes within its boundaries the ground claimed by respondents as a quartz lode location, claims title and right of possession to the ground in dispute by virtue of his patent aforesaid. The cause was submitted to a jury on special issues, who returned into court, in substance, the following findings of fact:

That on and prior to December 14, 1878, a vein of quartz or other rock in place, bearing gold and silver, was known to exist within the limits of the ground in controversy; that the existence of said vein or lode could have been ascertained on and prior to December 14, 1878, by any person examining the ground with an honest endeavor to ascertain if it contained any such vein or lode; that Zinn & McEwen, predecessors and grantors of plaintiffs, in the month of April, 1878, discovered within the limits of the ground in controversy a vein or lode of quartz, with at least one well-defined wall, bearing gold and silver; that said Zinn & McEwen, at the time of making said discovery, posted a notice upon the ground in controversy claiming said ground and the lode or vein which it included as a lode mining claim, and at the same time distinctly marked on the ground by stakes, so that its boundaries could be readily traced, the said mining claim and location, which was named by them in said notice and location the Pay Streak lode; that said Zinn & McEwen posted said notice and marked their location upon the ground claimed by them as the Pay Streak lode, which ground included within its limits the vein or lode which they had discovered; that said Zinn & McEwen, in the month of April, 1878, and within 20 days after they claimed to have discovered a vein or lode, made and filed in the proper county notice and claim of location of the Pay Streak lode, such as was commonly employed in claiming and recording lode claims in that mining district; that said Zinn & McEwen, about the twelfth day of July, 1881, conveyed to plaintiffs their interest in the ground claimed as the Pay Streak lode claim in controversy in this action, and that the plaintiffs, on or about the second day of August, 1881, and before the commencement of this acction, caused a survey to be made of the ground claimed by them as the Pay Streak lode claim and marked the location claimed by them distinctly on the ground so that its boundaries could be readily traced; that the plaintiffs at about the same time posted a notice on the ground so surveyed, claiming the same as the Pay Streak lode claim, a duplicate of which notice was in evidence as the recorded notice and claim of the relocation of the Pay Streak lode claim, which notice, within 20 days after such relocation, was made and filed in the recorder's office of the proper county; that the ground in controversy in this action is the same ground claimed to
44 have been surveyed and relocated by plaintiffs in August, 1881, and is the same ground or part of the same that Zinn & McEwen claimed to have located as the Pay Streak in April, 1878; that the ground claimed to have been surveyed and relocated by plaintiffs in August, 1881, included within its limits the place where

Zinn & McEwen claimed to have discovered a vein or lode in April, 1878; that plaintiffs had possession of the ground in controversy, working the same at the date of the commencement of this action; that appellant, on the fourteenth day of April, 1878, applied for, and on the twenty-eighth day of July, 1880, obtained, a patent from the United States, which included within its limits the ground in controversy, and as to the question whether there was any vein or lode known to the appellant to exist within and upon the premises in controversy when he applied for a patent, the jury answered and said that they could not agree.

Upon these facts judgment was rendered for respondents for the ground in question, from which the appellant appeals to this court. There does not seem to have been any question at the trial or claim on the part of appellant that the Pay Streak mining claim and location of April 23, 1878, had ever been in any manner abandoned or forfeited or that the relocation of respondents of August 2, 1881, was not of the same ground originally located as the Pay Streak mining claim. As to whether this claim was known to the appellant to exist within and upon the premises in controversy when he applied for and obtained a patent for said ground as a placer claim, the jury could not agree, and this disagreement suggests the questions upon which appellant asks a reversal of the judgment: (1) Was it within the authority and jurisdiction of the court to have rendered a judgment for plaintiff for the ground in question, the jury not having found upon all the interrogatories submitted to them by the court? (2) Did the placer patent necessarily include the lode mining claim location, unless such lode claim was known to appellant to exist at the time or before he applied for his patent? And is this question determinable in this action or was it conclusively adjudicated in the land office?

1. As to the first question, this is a suit in equity to quiet title. The decree emanates from the judge sitting as a chancellor, and he is alone responsible for the decree. In actions of this character the judge may try the case without a jury, or he may submit special issues to the jury, but their findings of fact is not binding upon the chancellor; he may adopt or disregard the findings of the jury or make findings of fact of his own and render his decree thereon. In the case of Gallagher *v.* Basey, 1 Mont., 461, 462, this court held—

"That under and by virtue of the act organizing this Territory, the supreme and district courts are clothed with chancery as well as common-law jurisdiction, and, in the exercise of the authority thus conferred, the forms of proceedings must conform to the well-known and recognized distinctions pertaining to said jurisdictions as limited by law—that is to say, causes in equity wherein equitable relief is demanded or where an equitable defense is made to a claim at law must be tried as in a court of chancery, and that the decree must proceed from the judge sitting as a chancellor, and it would be error in the class of cases described to try them as at law to a jury; that it is competent to limit and control by statute the forms of proceedings in actions at law and suits in equity, but that no statute and no law of our legislature can in any manner destroy

or blend together these separate and distinct jurisdictions; that our organic act recognizes a distinction between suits in equity and actions at law; and that the substance of this distinction must be preserved, although the forms of proceedings may be prescribed and limited by law; and that the civil code may be followed in equity cases so far as the same is applicable, but that care must be taken to preserve the distinguishing features of a suit in chancery. * * * The suit under consideration was a bill in chancery wherein the equitable jurisdiction of the court was properly invoked, and the record herein clearly shows that it was tried to the court sitting as a chancellor, and that the decree emanates from the chancellor, and that the questions submitted to the jury were to aid the conscience of the court, but not to control it, as fully appears from the fact that while the jury answered that, as against the plaintiffs, the defendants had not diverted or appropriated the waters of the stream to the injury or damage of the plaintiffs, the court found precisely to the contrary, that the defendants had diverted and appropriated said waters to the damage and injury of the plaintiffs, and based a decree for a perpetual injunction upon the fact."

All this applies strongly to the case we are considering; for here, as in the case cited, the court, in rendering its decree, disregarded some of the findings of the jury and adopted others of their findings as its own, and, as to some questions of fact, made independent findings upon the proofs and admissions in the pleadings, treating the findings of fact by the jury as merely advisory, but not binding upon the court. This, under the authority cited, was clearly within the authority and jurisdiction of the court, and the decision in the case of Gallagher *v.* Basey is approved. The force of this decision is not invalidated by the act of Congress of April, 1874, which declares that it shall not be necessary in the courts of the several Territories of the United States to exercise separately the common-law and chancery jurisdictions vested in said courts, and that the several codes and rules of practice adopted in said Territories, respectively, in so far as they authorize a mingling of said jurisdictions or uniform course of proceeding in all cases, whether legal or equitable, be validated and confirmed. Supp Rev. St. U. S., 12. Subsequent to the enactment of that statute (October, 1874) the Supreme Court of the United States, in the case of Basey *v.* Gallagher, 20 Wall., 679, appealed from the supreme court of this Territory to that Court, says:

"By the organic act of the Territory the district courts are invested with chancery and common-law jurisdiction. The two jurisdictions are exercised by the same court, and under the legislation of the Territory the modes of procedure, up to the trial or hearing, are the same, whether a legal or equitable remedy is sought. The suitor, whatever relief he may ask, is required to state, 'in ordinary and concise language,' the facts of his case upon which he invokes the judgment of the court; but the consideration which the court will give to the questions raised by the pleadings, when the case is called for trial or hearing, whether it will submit them to a jury or pass upon them without any such intervention, must depend upon the jurisdiction which is to be exercised. If the remedy sought be a

legal one a jury is essential unless waived by the stipulation of the parties; but if the remedy sought be equitable the court is not
46 bound to call a jury, and if it does call one it is only for the purpose of enlightening its conscience and not to control its judgment. The decree which it must render upon the law and the facts must proceed from its own judgment respecting them and not from the judgment of others. * * * The formal distinctions in the pleadings and modes of procedure are abolished, but the essential distinction between law and equity is not changed. The relief which the law affords must still be administered through the intervention of a jury, unless a jury be waived. The relief which equity affords must still be applied by the court itself, and all information presented to guide its action, whether obtained through masters' reports or findings of a jury, is merely advisory. Ordinarily, where there has been an examination before a jury of a disputed fact and a special finding made, the court will follow it; but whether it does so or not must depend upon the question whether it is satisfied with the verdict. This discretion to disregard the findings of the jury may undoubtedly be qualified by statute, but we do not find anything in the statute of Montana regulating proceedings in civil cases which affects this discretion. That statute is substantially a copy of the statute of California as it existed in 1851, and it was frequently held by the supreme court of that state that the provision in that act requiring issues of fact to be tried by a jury, unless a jury was waived by the parties, did not require the court below to regard as conclusive the findings of the jury in an equity case, even though no application to vacate the findings was made by the parties, if in its judgment they were not supported by the evidence." Still *v.* Saunders, 8 Cal., 287; Goode *v.* Smith, 13 Cal., 81; Duff *v.* Fisher, 15 Cal., 376; Weber *v.* Marshall, 19 Cal., 447.

The provision of our code of civil procedure is the same as that of California, and provides that, in all cases, issues of fact must be tried by a jury (Rev. St., p. 83, § 241); but the decision of the Supreme Court of the United States, since the act of Congress of 1874, validating and confirming the codes and rules of practice in the Territories, which prescribe a uniform course of proceeding in all cases, whether legal or equitable, and the decision of our own supreme court before that act, under a code containing the same provision as to the trial of questions of fact, ought to be conclusive upon the question that an equity case should be tried by the court, and that it is discretionary with the court whether special issues be submitted to a jury to aid the court in arriving at the facts, and that such special issues and findings may be adopted or rejected by the court, as the evidence may require.

2. Was it necessary for the court to have found that the defendant knew of the existence of the Pay Streak location and claim at or before the date of his application for a patent to placer ground in order to have rendered a judgment in favor of respondents? The statute of the United States providing the manner and mode of proceeding to obtain a placer patent to ground that does or does not

contain within its boundaries a lode mining claim is as follows (Rev. St. U. S., § 2333):

"When the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, sub-
47 ject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such lode claim and twenty-five feet of surface on each side thereof. The remainder of the placer claim or any placer not embracing any vein or lode claim shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs and proceedings; and where a vein or lode, such as described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim an application for a patent for such placer claim, which does not include an application for the vein or lode claim, shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known a patent for the placer claim shall convey all valuable mineral or other deposits within the boundaries thereof."

Section 2320 defines the extent of a lode mining claim and provides that, unless controlled by the customs and regulations of the miners' or the local laws, such lode claim may extend 1,500 feet in length along the vein or lode and 300 feet on each side of the middle of the vein at the surface. This is the kind of a lode mining claim referred to in the section above quoted and which, if known to exist within the boundaries of a placer claim for which application is being made for a patent and which does not include an application for such vein or lode claim, shall be construed as a conclusive declaration that the placer claimant has no right to the possession of the vein or lode claim. There is a vast difference between a vein or lode and a vein or lode mining claim. A vein or lode may be entirely concealed beneath the earth's surface and unknown to exist, while a lode mining claim is on the surface, exposed to view, designated by stakes and monuments so that its boundaries may be readily traced, besides a notice posted on the claim and a record of the location in the proper county. By the terms of the statute it is a vein or lode in a placer claim, the existence of which is not known, that the placer patent carries with it. There is no provision in the statute which authorizes the placer claimant to acquire title to a lode mining claim by virtue of his placer patent. If the lode mining claim is known to exist the placer applicant must also apply for a patent for such lode mining claim. He acquires no title to the lode claim by virtue of his placer patent, and if he makes no application for the lode claim he is conclusively presumed to have no right to or interest in it.

The theory of the statute is that a vein or lode of quartz may exist in placer ground that is unknown, because it may be concealed beneath the surface and afterwards uncovered by working the placer

claim, but no such presumptions can arise as to a lode mining claim, which must exist on the surface and be distinctly marked and bounded, so that the same may be designated and distinguished from all other property. A lode mining claim is a definite, distinct, and certain tract or parcel of land, the same as is a farm or a town lot, and a location according to law, and the record thereof is the title by which it is held and owned. The location of a quartz lode mining claim, perfected according to law, creates an existing
48 outstanding grant of the exclusive right to the possession and enjoyment of all the surface ground included within the boundaries of the claim; and such a location is just as much a withdrawal from the public domain of the right to take the possession of the property located as is the fee withdrawn by a valid grant from the United States under the authority of law or the possession by a valid and subsisting homestead or pre-emption entry. Such a location, when perfected, has the effect of a grant by the United States of the right of present and exclusive possession. Belk *v.* Meagher, 104 U. S., 279.

In the case of Silver Bow M. & M. Co. *v.* Clarke, *ante*, 574–576, decided at the present term, this court used the following language:

"Having discovered a vein or lode and made a location thereon according to law the locator then becomes entitled to the exclusive right to the possession and enjoyment of all the surface ground included within the lines of his location. This is the express provision of the statute (section 2322), and is in harmony with section 2319, which declares that the ground in which the mineral deposit may be found shall be open to occupation and purchase. The right to acquire the full title which attaches to and accompanies every valid location of a mining claim ought to be and is followed by the right to the exclusive possession and enjoyment of the soil of such claim. * * * This statute is pre-emption law, and by the location of a mining claim under it the grounds included within the boundaries of the location are just as much withdrawn from the public domain as the fee is by a valid grant from the United States under the authority of law, or the possession under a valid and subsisting homestead or pre-emption entry. This statute is an offer to sell the public mineral lands by the owner thereof, and the locator, by making a location thereon, accepts the offer, thereby closing the contract of purchase, and the purchaser becomes entitled to a conveyance when he has complied with the terms of the contract. * * * If, then, the location of a mining claim has the effect of a grant by the United States to the locator of the right to the present and exclusive possession of the ground located, it follows that there could not be a like grant of the same property to any other person."

The land included within the boundaries of the Pay Streak mining claim having been thus sold and withdrawn from the public mineral lands, by what law or authority is it included in a placer patent and sold again to some other person? If the Government issues a patent for lands that have been previously sold or reserved from sale the patent is so far void (Steel *v.* Smelting Co., 106 U. S., 450; S. C. 1 Sup. Ct. Rep., 389; Patterson *v.* Winn., 11 Wheat.,

380; New Orleans *v.* U. S., 10 Pet., 662; Reichart *v.* Felps, 6 Wall., 160; Best *v.* Polk, 18 Wall., 112; Morton *v.* Nebraska, 21 Wall., 660; Stoddard *v.* Chambers, 2 How., 284; Polk's Lessee *v.* Wendell, 9 Cranch, 99; Same *v.* Same, 5 Wheat., 293; U. S. *v.* Tichener, 12 Fed. Rep., 415; Smelting Co. *v.* Kemp, 104 U. S., 644; Copp, Min. & Land Laws, 282); and whether the elder title or grant is "known" to the subsequent claimant is wholly immaterial. A lode-claim location being perfected according to law, and recorded in the proper county as the law directs, and not abandoned or forfeited in any way, is a title that the locator or his grantees in good faith may hold and defend against every other person or claimant by a subsequently acquired title. His
49 right to the ground located is property which he may dispose of at pleasure. He holds it by virtue of his location, which becomes a contract of sale and purchase between the locator and his grantees and the Government. This is his title—the means by which he holds possession and the right of possession to his ground; and when thus held the ground cannot be relocated, claimed, or taken from him in any way, so long as he complies with the law. A mining claim thus located, owned, and held is "known" to exist, within the meaning of the statute. It is "known" as any other title is, by the record; and better, for the location is so distinctly marked and designated on the ground that its boundaries may be readily traced. The law presumes that such a title is known to exist; and whether it is known or not, no other person can acquire any title or interest in the property so located, granted, and sold. The Government cannot sell to a placer claimant property that it has already sold to a quartz locator as a lode mining claim, and whether the placer claimant "knows" that the Government has sold the property to another is immaterial. The title of the purchaser cannot depend on his knowledge. The purchaser holds by virtue of a grant from the Government, and if this grant is evidenced by a perfected location, any other person attempting to obtain title to the same ground is presumed to "know" of the prior grant. A patent to one person for a portion of the mineral lands of the United States already sold by the Government to another person is void, and the knowledge of the patentee does not affect the matter one way or another; and so, whether the appellant knew of the existence of the Pay Streak mining claim or not, he could not acquire any title to such mining claim by virtue of his placer patent. The Government could not convey to him what it had already sold to the respondents and their grantors.

It is claimed that the reservations in the placer patent of all quartz leads known to exist therein are void. This patent is not before us, but if it contains these reservations it shows that the Land Department did not inquire and adjudicate upon the question as to the existence of lode mining claims within the boundaries of the placer patent. If it had, it would have excepted them from the grant by specific boundaries and by name; but whether the patent makes such exception or not is immaterial. The grant of the placer patent only attaches to such of the public mineral lands as the Gov-

ernment had the right to sell and had not sold or withdrawn from sale before. Lode mining claims are excepted from the placer patent by the statute, and it is impossible for the Land Department to grant the title to such claims in a placer patent.

It is held by all the authorities that the action of the Land Department in issuing a patent for the public lands subject to sale by preemption or otherwise, when acting within the scope of its authority, is conclusive upon the legal title; but whether the land so conveyed was public land and subject to sale, or, in other words, what is conveyed by the patent under the statute by which it was issued, may be inquired into even in an action at law. Iron Silver Min. Co. *v.* Sullivan, 16 Fed. Rep., 829; S. C., 109 U. S., 550; S. C., 3 Sup. Ct. Rep., 339.

"These presumptions as to the conclusiveness of a patent and the title it conveys are confined to matters over which the Land Department has jurisdiction. It must act within the scope of its authority and as authorized by law. If it goes beyond its jurisdiction, the patent would be so far void, and this may be shown in an action at law." Silver Bow M. & M. Co. *v.* Clarke, *supra.* "Of course, when we speak of the conclusive presumptions attending a patent for lands we assume that it was issued in a case where the Department had jurisdiction to act and execute it—that is to say, in a case where the lands belonged to the United States and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the Department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the Department would, in that event, be like that of any other special tribunal not having jurisdiction of a case which it assumed to decide. Matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law." Steel *v.* Smelting Co., *supra;* Polk's Lessee *v.* Wendell, 9 Cranch, 99; Patterson *v.* Winn, 11 Wheat., 380; Hoofnagle *v.* Anderson, 7 Wheat., 212; Boardman *v.* Lessee of Reed, 6 Pet., 328; Bagnell *v.* Broderick, 13 Pet., 436; Moore *v.* Robbins, 96 U. S., 530.

These authorities are conclusive upon the proposition that if the Land Department undertakes to convey by patent a title to the public lands which have previously been sold by the Government the patent is void, and that this matter may be inquired into even in an action at law, and in a court of equity the inquiry, under proper averments, may take a much wider scope. This action is not an attack on the placer patent, but is an inquiry as to what was conveyed by the patent under the statute by virtue of which it was issued. Appellant's patent is good so far as it was authorized by law, and respondents do not impeach it or question it to that extent. They seek to show what, under the statute by virtue of which the patent was issued, was conveyed by it. A patent issued in pursuance of law is conclusive upon the legal title, but if issued for lands previously sold or reserved from sale it has no effect upon the legal title for

the reason that it is not issued in pursuance of law, and is therefore void. It was not necessary that the owners of the Pay Streak mining claim should have filed any protest or adverse claim to the placer application of appellant. They did not own or claim any interest in the placer ground, and the appellant could acquire no in-
51 terest in their ground by virtue of his placer patent. It was found by the jury as a fact, and adopted and approved by the court, that the grantors of respondents, in April, 1878, and six months before appellant's application for a patent on the public mineral lands of the United States, discovered a vein or lode of quartz or other rock in place, bearing silver, gold, and other valuable deposits, within the boundaries of the ground mentioned in appellant's application, and thereupon made a location of the Pay Streak mining claim, by virtue of and including such discovery, by staking the same so that its boundaries could be readily traced and posting a notice on the claim within the boundaries thereof and having the same recorded in the proper county pursuant to law. It was a perfected lode-claim location, and so continued in full force and effect at the time when the appellant applied for and obtained a placer patent for the same ground. The placer patent is void as to the ground included within the boundaries of the lode-claim location.

The judgment is affirmed.

52 *Judgment on Appeal.*

In Supreme Court of Montana Territory. January Term, 1885.

LEE MANTLE & PATRICK A. LARGEY, Pl'ffs & Respondents,

vs.

JOHN NOYES, Def't & Appellant.

This cause having been brought into this supreme court by virtue of an appeal from the judgment and decree of the court below, rendered and entered therein on the 16th day of October, A. D. 1882, and filing the transcript of the record in said cause in this court, said cause came regularly on to be heard before the court on said transcript of record at the August term, 1884, of this court, and was argued by counsel; whereupon the court took said cause under advisement.

And in the present term of January, A. D. 1885, said cause came on for decision and judgment of this court on appeal; whereupon, on consideration, it is now here ordered and adjudged by this court that the judgment and decree of the court below, in said cause rendered and entered as aforesaid, be, and the same is hereby, affirmed with costs.

53 And it is hereby further ordered by this court that said respondents, Lee Mantle and Patrick A. Largey, recover against said appellant, John Noyes, — dollars for their costs herein expended, and have execution therefor.

8th January, 1885.

And on the 31st day of January, 1885, the court made & filed the following finding herein at the request of appellant's counsel, viz:

Finding of Fact.

LEE MANTLE *et al. vs.* JOHN NOYES.

"The court finds as facts in this case the facts found by the jury and by the court below in the decree entered herein."

And on the 23d day of January, 1885, the said appellant filed herein his notice of appeal to the Supreme Court of the United States from the foregoing judgment and decree herein, of which said notice of appeal the following is a copy, viz:

54 In the Supreme Court of Montana Territory.

LEE MANTLE and PATRICK A. LARGEY, Plaintiffs,
vs.
JOHN NOYES, Defendant.

To plaintiffs herein and W. W. Dixon, Esq., their attorney:

Take notice that the def'ts herein appeal to the Supreme Court of the United States from the judgment of this court made and entered on the 8th day of January, 1885, affirming the judgment of the court below in favor of pl'ffs and against def't, and from every part thereof. Said appeal is based upon the judgment roll and statement therein, as appears of record, and the errors therein assigned.

ROBINSON & STAPLETON &
THOS. L. NAPTON,
Att'ys for Def't.

Accept service and waive copy of the above notice of appeal this 20th day of January, A. D. 1885.

W. W. DIXON,
Att'y for Pl'ffs.

And on the same day said defendant filed herein an affidavit of value of the property in controversy in said action as follows, viz:

55 *Affidavit of Value.*

TERRITORY OF MONTANA, }
County of Silver Bow, } *ss:*

In the Supreme Court of Montana Territory.

LEE MANTLE *et al.*, Pl'ffs, *vs.* JOHN NOYES, Def't.

John Noyes, being first duly sworn, says that he is the defendant in the above cause; that the value of the property in controversy in this action exceeds the sum of two thousand dollars.

JOHN NOYES.

Subscribed and sworn to before me this 19th day of January, A. D. 1885.

[NOTARIAL SEAL.] WILLIAM H. DE WITT,
Notary Public, Montana.

And on the same day the said defendant filed herein his bond on appeal, as follows, viz:

56 *Bond on Appeal.*

In the Supreme Court of Montana Territory.

LEE MANTLE *et al.*, Plaintiffs, *vs.* JOHN NOYES, Def't.

Know all men by these presents that we, John Noyes, as principal and William M. Jack and George W. Newkirk, as sureties, are held and firmly bound unto Lee Mantle and Patrick A. Largey, pl'ffs and appellees in the above cause, in the sum of one thousand dollars lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents. The conditions of the foregoing obligation are such that whereas the above court did, at the January term of said court, 1885, affirm the decision of said cause made by the district court, 2d judicial district, Silver Bow county, Montana Territory, in this cause; and whereas the def't herein and appellant is desirous of appealing from the decision of the above court to the Supreme Court of the United States; and whereas the said
57 Supreme Court required def't herein to give bond in the sum of one thousand dollars in order to perfect said appeal and stay all proceedings herein until the final determination of this cause in said Supreme Court of the United States: Now, if the said principal herein shall well and truly pay all damages and costs that appellees may sustain by reason of said appeal if the court shall finally decide that appellant is not entitled to an appeal or shall affirm the judgment of this court in whole or in part, or if def't and appellant shall not prosecute said appeal with effect, or if the same shall be dismissed for want of prosecution, and the said principal herein shall pay all damages and costs that may be awarded to said obligees, not exceeding the sum of $1,000.00, then this obligation to be null and void; otherwise to remain in full force and effect.

Witness our hands and seals this 20th day of January, A. D. 1885.

JOHN NOYES. [SEAL.]
WILLIAM M. JACK. [SEAL.]
GEORGE W. NEWKIRK. [SEAL.]

58 TERRITORY OF MONTANA, }
County of Silver Bow, } *ss:*

William M. Jack and George W. Newkirk, being first duly sworn, says that *he is a* resident- and householder- in the county and Territory aforesaid, and *is* worth the sum of $2,000.00 in property situ-

ated in said county and Territory over and above *his* just debts and liabilities and exclusive of property exempt by law from execution.

WILLIAM M. JACK.
GEORGE W. NEWKIRK.

Subscribed and sworn to before me on this 20th day of January, 1885.

CHARLES S. WARREN,
Notary Public, Montana Territory.

Approved:
D. S. WADE, *Chief Justice.*

Filed Jan'y 23, 1885.

J. R. ALDEN, *Clerk.*

59 In Supreme Court Montana Territory.

LEE MANTLE *et al.*, Appellees,
vs.
JOHN NOYES, Appellant.

I, J. R. Alden, clerk of the supreme court of Montana Territory, do hereby certify the foregoing fifty pages, numbered from 1 to 50, inclusive, to contain a full, true, and correct transcript of certain pleadings, records, and proceedings filed, made, and had in the above-entitled cause and court as the same appear on file and of record in my office.

In witness whereof I have hereunto set my hand and affixed my official seal this 1st day of May, A. D. 1885.

[Seal Supreme Court Montana Territory.]

J. R. ALDEN, *Clerk.*

Endorsed on cover: Montana Territory supreme court. No. 242. John Noyes, appellant, *vs* Lee Mantle and Patrick Largey. Filed July 6, 1885.

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FILED.
JAN 9 1888
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

October Term 1887.—No. 242.

JOHN NOYES, APPELLANT,

vs.

LEE MANTLE AND PATRICK LARGEY, RESPONDENTS.

Points and Authorities of Counsel for Appellant.

1st.

This is an action in the nature of a bill in equity to quiet title, commenced by respondents in the District Court Second Judicial District, Silver Bow County, Montana Territory.

The cause was tried by Hon. Wm. J. Galbraith, sitting as a chancellor, and the jury was empanneled, to answer certain interrogatories submitted to them, by the chancellor, and such Findings were afterwards approved in part and made the findings of the Court. (See pp. 14–15 of Transcript.) Judgment was for plaintiff *and* against defendant.

The case was thereupon appealed to the Supreme Court of the Territory, and the Findings of Facts by the Court below were adopted by the Supreme Court of the Territory in its opinion, and especially bound, for the purposes of this appeal, the same findings as were made by the Court

below. (See p. 28 of Transcript.) Judgment of lower Court was affirmed.

It was tried and conducted in the lower courts as a case in equity (see opinion of Court, p. 18 of Transcript), and properly comes here, by appeal, as although a jury was used as a part of the machinery, for the trial below; the judge tried the cause as an equity cause, and made his own findings, and was only assisted by the jury, and it was only used to "enlighten the conscience of the chancellor in regard to the facts."

2d.

The Findings of Fact by the jury, and approved by the Court from one to thirty-one inclusive, are immaterial when considered in connection with the findings submitted by defendant and approved by the chancellor; *that on the 14th day of April*, 1887, *defendant applied for and on 28th day of July*, 1880, *obtained a patent from the Government of the United States to the ground in controversy as a placer-mining claim.* The jury could not agree, and the chancellor did not find whether or not as a fact the defendant at the time of the application for a patent, or on receipt of the same, *knew* of the existence of a quartz lode-mining claim within the boundaries of his placer patent, nor whether it had been surveyed out as provided for by section 2333 Rev. Stats. U. S.

3d.

We contend that the findings are immaterial, first, for the reason that the Court did not submit to the jury or find as a fact itself that there was any *valuable mineral deposit* as a lead or lode known to exist to any one at the date of defendant's application for or receipt of patent, and that this is a condition precedent to any title or color of a title in any one as against the holder of a placer

mineral patent. (See Deffenback *v.* Howke, 115 U. S., 392; Revised Statutes, sections 2319–2320.)

Second. That a lead of quartz of whatsover width or appearance must be valuable as such before an applicant for a placer patent has to take any notice of it, and that his patent is conclusive of such fact when he receives it as against all parties whatsover, except the Government should see fit to interfere; that mere crevices or veins of quartz, unless they are known to be valuable, are not to be taken notice of by an applicant for a placer patent, and such knowledge must be brought home to him and not to some "wandering Jew" who comes along to swindle a party out of what he has bought and paid for. If there was any fraud about the matter it was upon the Government, and not upon the party who sat quietly by and filed no adverse claim.

Section 2333 Rev. Stats. U. S. provides only as to what the mineral applicant for patent in case *he knows* of such a lead, lode, ledge, or mining claim containing valuable mineral deposits should do, and if *he* has such knowledge, how he should proceed, and pay extra for the land to the extent of twenty-five feet on each side of the vein. The applicant gets his patent, and pays for the land as placer ground, not knowing himself of any valuable deposit, such as the statutes of 1872 required him to pay for as lead property. Some other party knows of the fact of a vein of quartz being in the ground, does not know anything about its value, but he keeps quiet, lets the party acquire his title by patent to 20 acres of placer ground. This unknown party knows of a lead 1,500 by 600 feet for a lode claim that will take in the *exclusive right* to the possession of the placer patent, being a little in excess of his entire twenty acres as patented. We candidly submit this proposition as the legitimate and necessary result of the construction placed upon the statutes by the distinguished jurist who

delivers the opinion of the Montana Appellate Court. The Government cannot sell "a" land for $2.50 per acre and then sell it over again for $5 per acre, and give the last grantee the *exclusive* right to the possession.

If this result is contemplated by the statutes of the United States, or can be reasonably or fairly deduced therefrom, the sooner the statute is repealed the better off the owners of mineral ground will be. A good, lawful, and *honest* citizen of the country could not do so, and we hardly think the Government intends to by a fair and reasonable interpretation of the act of 1872. The Montana Supreme Court says, though, that the Government had already parted with the title to the lode-mining claim when it was located by Zinn and McEwan. We ask, then, why *they* did not, or plaintiffs did not, file an adverse claim to the placer application for patent? If they did not they lost their title, for no one would contend for a moment but that the owners of a quartz claim could and should adverse a placer-mineral application for patent, for if he does not he certainly must lose his surface ground, or else a placer-mineral patent is no better than a blank piece of parchment.

See Haydenfeldt *v.* Dany, G. & S. M. Co., 93 U. S., 635.

Moore *v.* Snow, 17 Cal., 200.

Ah Tew *v.* Choate, 24 Cal., 562.

The words known to exist have been frequently interpreted by this Court in other statutes.

21st Wallace, 674.

Diffenback *v.* Howke, 115 U. S., 392.

—and in the recent case of United States *v.* Iron Mining Co., of Colorado, October Term 1887.

A bare possession of barren quartz, or such as is not a *valuable mineral deposit*, as designated by section 2320, would

not require a placer applicant, even if *he* knew its existence, to survey it out and pay for it, as quartz mineral ground. If known and owned by some one else than the patentee, he loses his title, by not adversing the patent, and the Government alone could act, to set aside the fraud on it. The Court below says the Government had already granted this land when plaintiffs or predecessors located the lead. The patent, though, is the highest source of title; it says the Government has not granted this land, or else it would not be paid for it again, and no one except myself can dispute the fact, unless fraud is shown, such as a party other than the Government can take advantage of. The land department had jurisdiction of the subject, and its judgment is final, so far as the rights of plaintiffs are concerned. Section 2333 of statute of 1872, provides only that the party may survey out the quartz lode, and if he does so, and pays for the balance of the ground as placer mining ground, then it is conclusive evidence that he does not claim or own the quartz lode-mining claim. If he does not do this, though, and pays for it all as placer ground, then the patent adjudges that there is no quartz lode there to pay for. This is the proof required by the Land Office.

See Copp's U. S. Mining Laws, p.

Third. Instructions one and two, page 8 of Transcript, given at request of plaintiffs, and excepted to by defendant, do not define such a vein or lode correctly, as required by the mining laws of 1872. They each leave out of question the very terms of the statute, to wit, the words *valuable mineral deposit*, whether it be a lead or placer; for of only such would the applicant for a placer patent be required to take notice or mention in his application for patent. If he knew of such himself, he would only be required to survey it out, twenty-five feet on either side of the vein, for his lode mining claim; but according to the

opinion and judgment of the Court below, an outsider, who does know of such a lead, with no value other than a mere crevice of quartz with mineral of a very little value, could take a location 600 feet in width and 1,500 feet in length.

These instructions are sufficient to reverse the case as not the law, particularly as against a patentee of placer ground.

4th.

The placer patentee must know *himself* of the existence of the lode claim, or he could not have it surveyed out, and by issuing the patent to him it is conclusive evidence that he did not know of its existence, and if any one else knew it, and did not adverse, *his claim* or *title* is lost by his silence. If the Government should ascertain the fact that the placer patentee had *knowingly* perpetrated a fraud upon it, by paying for the land at a smaller price, it could vacate the patent; but how could the patentee perpetrate a fraud, when he did not know himself of a valuable mineral deposit, which *he* might be required to know under the law, but it does not require him to know of any crevice of quartz known to others than himself, and which they (plaintiffs) were not working for its valuable minerals, and never intended to.

The Court below, on page 23 of Transcript, says that a party acquires no title to quartz claim, known to exist, by his patent. This is true; but it is equally true if he pays for all the land and acquires a patent to it, as a placer claim, it is conclusive evidence that he made proof before the Land Office that there was no lead or lode claim known to exist, or his money would not have been received or his patent issued.

The Court argues further, that these lode claims are staked off upon the surface of the ground, so that their

boundaries could be readily traced. Also true; but it is equally true that when a patent issues for a tract of land, as placer ground, that it must have adjudicated the fact that no such staking or marking the boundaries had taken place upon this land in dispute.

The words used in section 2333, that it should be conclusive evidence that the patentee of the placer claim does not own or claim title to the quartz lode-mining claim, is only applicable to the title of the placer patentee when he has, as provided for by the section, surveyed out the remainder of the ground, and paid for it as placer ground, and not to a case similar to the one in hand, where he pays for it *all* as placer ground. Therefore we say, that it devolved upon plaintiffs in this case to prove, as a condition precedent to their recovery of the ground patented to defendant, that he had surveyed out a quartz claim within the limits of his placer patent, and then defendant, by not paying for it as quartz lode-mining claim, would be conclusively presumed not to have any title or claim to the same.

5th.

The authorities cited by the Court below, in its opinion, are applicable to the state of facts in this case, but should have been used to reverse the judgment of the District Court instead of affirming it.

There is no question about the Land Department having jurisdiction to issue a placer patent, and by issuing to appellant adjudged the fact that the land included within its boundaries had not been sold to any one, else the patent would not have been issued. The Court says the Governernment had sold the land when it was located; it never was paid for it till the patent was issued, and must have determined the fact that it had not prior to that time granted it to anyone else or been paid for it. The course of argument

used by the Court below would be equally open to a party who acquired a title by patent to a quartz lode-mining claim, for another party could come in afterwards and say your patent is no account, for I had this ground located before your application or receipt of patent, and the Government could not sell you what it had already sold me.

The patent must necessarily shut off such claims, or it is only a means of cheating patentees.

6th.

We have carefully read the opinions of this Court delivered by Justice Miller in the cases of Iron Silver Mining Company *v.* Cheesman and Reynolds *v.* Iron Silver Mining Company, each reported in the 116 U. S. Report. We do not think they impinge upon the construction of the statute we give in this brief, for the questions for decision are not similar—that being an action of ejectment and damages, and this an action to *quiet title.* And as to what party must *know* of the existence of a lead, or lode, within the linear surface of the placer patent, the Court can readily see that *the applicant* for placer patent must make proof, by two disinterested witnesses, before the Land Office, that there is no lead, or lode, within the surface of the placer ground sought to be patented before his patent is issued or he gets his receipt and pays for all the land as placer ground. This, then, would convey the absolute title, except for fraud perpetrated on the Government, and *it* could alone interfere. If there is no lead known to exist, the patent carries the title; if they are known to exist, by any one other than the applicant, his rights are barred by not adversing; otherwise a placer patentee acquires no title to anything, for the quartz owner has the exclusive right to the possession of possibly the entire tract he has paid for,

and we think the distinction we draw, as taken from the case of Deffenback *v.* Howke, can be clearly stated as this: That there is a wide difference between a *valuable deposit* of *minerals* and a deposit of valuable minerals. The former, as to a quartz lead, the applicant for patent to placer ground makes proof, before the Land Office, as not existing within the linear limits of his land, to *his* knowledge, and substantiates his statement by the oath of two disinterested witnesses: this latter he pays no attention to, because the law of 1872 does not require that he should. If there is a valuable lead staked off, he makes proof of the fact and pays for it. If there is none he pays for all the land as placer mineral land, and by doing so the fact that there is no such land staked off must be adjudicated. He must get some title by his patent, and to say that a lead title may still exist within his land is to hold that he gets nothing but a certificate that he has knowingly perpetrated a fraud, and paid his money for nothing.

7th.

Under no circumstances, we contend, could the plaintiff's pay-stock lode claim go beyond what the placer applicant did not acquire title to by his patent, 25 feet on each side of lead, and the cause should be reversed for that reason, and to inquire the value of this pretended lode of plaintiffs.

Appellants respectfully submit this cause on the above and foregoing argument.

THOS. L. NAPTON,
Of Counsel for Appellant.

In the Supreme Court of the United States—October Term, 1887.

JOHN NOYES, Appellant,
vs.
LEE MANTLE and PATRICK LARGEY. } No. 242.

TERRITORY OF MONTANA,
County of Silver Bow, } *ss.*

John Noyes, being first duly sworn, says: That he is the appellant in the above cause; that the matter in dispute in the above cause, exclusive of costs, exceeds the sum of five thousand dollars.

JOHN NOYES.

Subscribed and sworn to before me on this 23d day of December, 1887.

[SEAL] JAMES W. FORBIS,
Notary Public.

JAMES H. McKENNEY

Supreme Court of the United States.

OCTOBER TERM, 1887.

JOHN NOYES, *Appellant*,

v.

LEE MANTLE & PATRICK LARGEY, *Respondents.*

No. 242.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

Brief of the Argument for Respondents.

S. S. BURDETT,
Attorney for Respondents.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1888.

In the Supreme Court of the United States—October Term, 1887.

JOHN NOYES, Appellant,
vs.
LEE MANTLE and PATRICK LARGEY. } No. 242.

TERRITORY OF MONTANA,
County of Silver Bow, } *ss.*

John Noyes, being first duly sworn, says: That he is the appellant in the above cause; that the matter in dispute in the above cause, exclusive of costs, exceeds the sum of five thousand dollars.

JOHN NOYES.

Subscribed and sworn to before me on this 23d day of December, 1887.

[SEAL] JAMES W. FORBIS,
Notary Public.

124-348

FILED.
APR 9 1888
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1887.

JOHN NOYES, *Appellant*,

v.

LEE MANTLE & PATRICK LARGEY, *Respondents.*

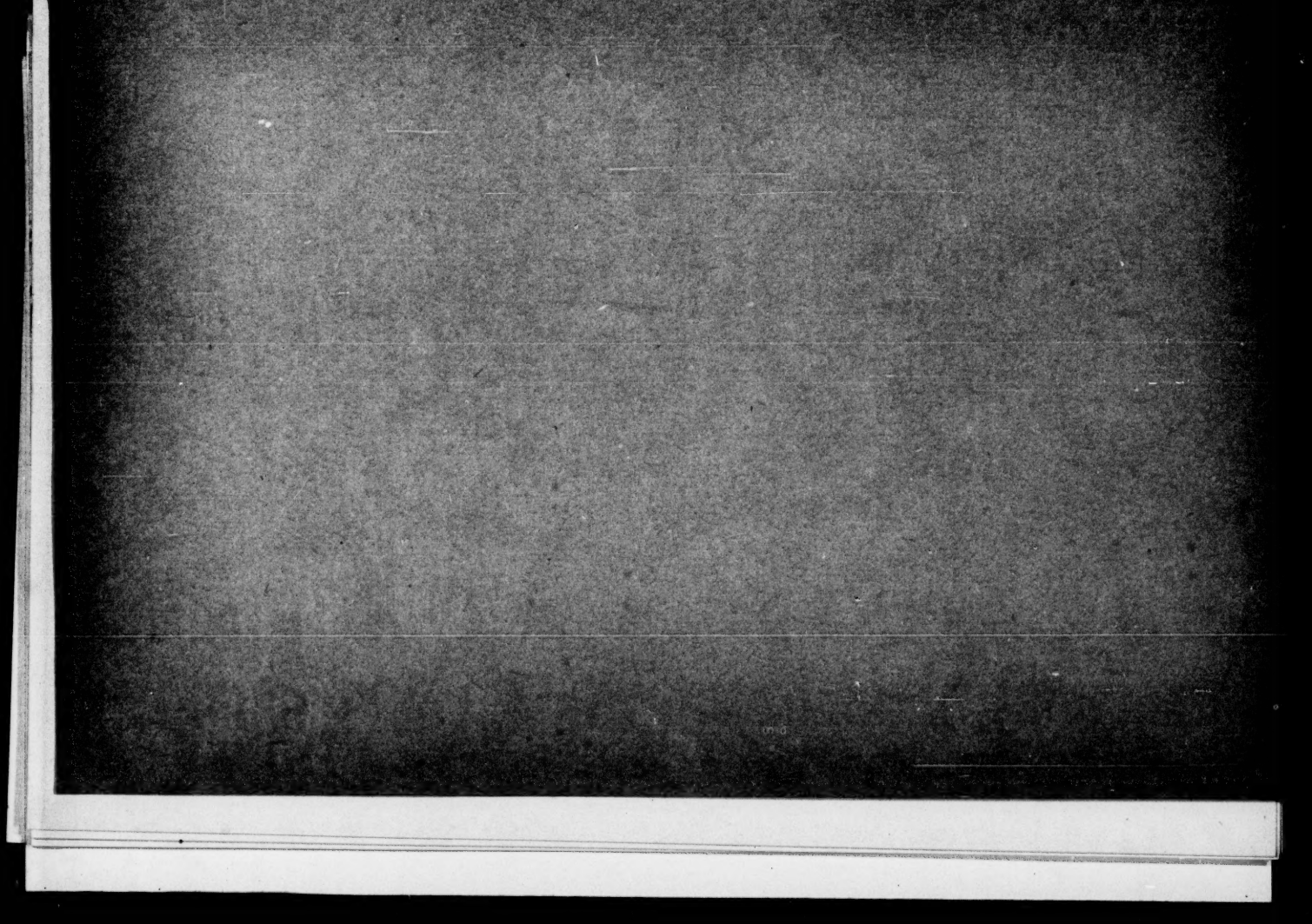
No. 242.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

Brief of the Argument for Respondents.

S. S. BURDETT,
Attorney for Respondents.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1888.



Supreme Court of the United States.

OCTOBER TERM, 1887.

JOHN NOYES,
APPELLANT,

v.

LEE MANTLE AND PATRICK LARGEY.
RESPONDENTS.

No. 242.

Brief for the Respondents.

The respondents, not considering the statement as made in the brief of appellants sufficiently complete, present the following

STATEMENT OF THE CASE.

This is a proceeding in equity brought in the District Court of Silver Bow county, Montana Territory, by Lee Mantle and Patrick Largey, plaintiffs, who are the respondents here, against John Noyes, defendant, who is the appellant in this court.

The purpose of the proceeding is to quiet title. The laws of Montana, Revised Statutes 1879, p. 110, provide as follows:

"SEC. 354. An action may be brought by any person in possession, by himself or his tenant, of real property, against

any person who claims an estate or interest therein adverse to him for the purpose of determining such adverse claim, estate, or interest."

The complaint alleges the possession and ownership by plaintiffs of a certain "quartz lode mining claim," called the "Pay Streak," discovered and located by their predecessors in interest on the 23d day of April, A. D. 1878, duly marked and bounded by monuments erected on the ground, and of their claim to which the requisite notice was posted, given, and recorded.

That the defendant Noyes asserts an estate adverse to them in the said quartz lode claim by virtue of a patent from the United States purporting to convey to him certain placer mining ground, which patent includes within its descriptive limits the said Pay Streak quartz lode claim; that the estate so asserted by him is invalid, because the said Pay Streak lode was a vein or lode of quartz or rock in place, bearing silver and other valuable mineral deposits, and was located, claimed, and known to exist at and before the time when defendant made application for patent for said placer ground; that defendant did not, with his application, disclose the fact that his said application included the said Pay Streak claim, or any other vein or lode of quartz or rock in place, nor did he apply for patent for or pay for any vein or lode, although the said Pay Streak was known to exist within the boundaries applied for by defendant at and before the time of his application for patent; that the acts of defendant in claiming an estate adverse to plaintiffs in said "Pay Streak" claim under his said placer patent cast a cloud upon plaintiffs' right and title to their lode claim, to their injury in the use and enjoyment thereof, wherefore they ask that their title thereto be established and quieted, and for other appropriate relief (Record, pp. 1–3).

There was a demurrer to the complaint, which was overruled (Record, 3, 4).

The answer denies the several affirmative allegations of the complaint, and for a separate defence avers that the defendant is the owner and in the possession of all that tract of land described in plaintiffs' complaint, and he and his grantors and predecessors have been since the year 1867; that about the 14th day of December, A. D. 1878, the defendant applied at the proper United States land office for a patent to said ground for placer mining purposes, giving due notice as required by law; that the United States, on the 28th day of July, 1880, executed to him its patent therefor, whereby it granted to defendant the said land for placer mining purposes, and all leads and lodes therein containing silver or valuable mineral deposits, except those known to exist at the date of said application for patent; and that defendant avers that said vein or lode claim described in plaintiffs' complaint was not then known to exist (Record, pp. 4–5).

There was a demurrer, which was withdrawn (Record, 6, 7), and thereupon a replication putting in issue the several allegations of the answer was filed (Record, 27).

A trial of the issues was had in September, 1882, before Hon. William J. Galbraith, Judge, sitting as a Chancellor, who it appears (Record, p. 8) submitted to a jury certain interrogatories, the answers to which were afterwards in the main approved and made the findings of the court (Record, pp. 11 to 15).

None of the testimony taken or heard in the case is preserved in the record, and there is no statement, by agreement, of its purport.

The findings of facts as returned by the jury and adopted by the Chancellor (except in one particular in which the finding was modified to agree with the pleadings and proof) are in substance as follows:

That defendant's application for a patent under his placer claim was made December 14, 1878.

That in the month of April preceding, viz., April, 1878, Zinn and McEwan, who were the predecessors in interest and grantors of the plaintiffs, discovered within the limits of the ground in controversy a vein or lode of quartz, or other rock in place, about four feet in width, with at least one well-defined wall, and bearing gold or silver; that they, in the same month, posted on the ground in controversy a notice claiming it as a lode claim, under the name of the "Pay Streak" lode claim, and distinctly marked the location, so claimed, by stakes and otherwise, so that its boundaries could be readily traced; that the location so marked and bounded by said Zinn and McEwan, and on which they posted the notice aforesaid, contained within its limits the said "Pay Streak" vein or lode; that in the said month of April, 1878, and within 20 days after their discovery, they made out in usual form and substance, and filed in the proper office of record, a notice and claim of location of the said "Pay Streak" lode, and that the existence of the said lode or vein could have been ascertained on and prior to the 14th day of December, 1878, when defendant's application for a placer patent was made, by any person examining the ground with an honest endeaver to ascertain if it contained any such vein or lode.

That said Zinn and McEwan conveyed to the plaintiffs, Mantle and Largey, by deed, about the 12th of July, 1881, their interest in the ground claimed as the "Pay Streak" lode claim; that thereupon plaintiffs (August, 1881) caused a survey of the ground claimed as the Pay Streak lode claim to be made, and the location claimed to be marked on the ground, so that its boundaries could be readily traced; that at the same time they (the plaintiffs) posted a notice on the ground claiming the same as the "Pay Streak" lode claim,

and within 20 days thereafter filed in the office of the recorder of the proper county their notice of claim and relocation of the " Pay Streak " lode claim ; that the ground in controversy is the same claimed to have been surveyed and relocated by plaintiffs in August, 1881, and the same which Zinn and McEwan located as the " Pay Streak " lode in April, 1878, and includes within its limits the place where said Zinn and McEwan discovered a vein or lode in April, 1878.

That the employés or workmen of plaintiffs were working on the ground for them on the 14th day of September, 1881, when this action was commenced, but as to whether or not the existence of a vein or lode upon the premises in controversy was known to defendant Noyes when he applied for or obtained his patent to said ground the jury reported " We cannot agree " (Record, pp. 11–14).

The particular in which the finding as returned by the jury was modified by the Chancellor was in respect to the *day* on which defendant applied for a patent. The answer of the jury fixes it as April 14, 1878, (Record, p. 13). The Chancellor set this finding aside, and found from the pleadings and evidence instead thereof " that the defendant applied for a patent from the United States, including within its limits the ground in controversy, on the 14th day of *December*, 1878, and obtained such patent on the 28th day of July, 1880."

The decree of the District Court was for plaintiffs and against defendants (Record, pp. 14, 15, 16.)

Appeal was taken to the Supreme Court of the Territory. It was argued by counsel at the August term, 1884, and at the January term, 1885, the court delivered its opinion affirming the judgment below (Record, pp. 18–27), and there was a final decree accordingly (Record, p. 27).

Mantle *el al. v.* Noyes, 5 Mont., 274.

The findings of facts by the court below were adopted by the Supreme Court of the Territory (Record 28).

There is but little in the record to indicate what were the errors of fact or law relied upon by the appellant in the, Supreme Court of the Territory to reverse the decision below.

The only bill of exceptions anywhere appearing is at page 9 of the record; the objection there preserved is not elsewhere urged.

It is to be gathered from the opinion of the territorial Supreme Court that the following were the questions there raised in argument:

1. Was it within the authority and jurisdiction of the court to have rendered a judgment for plaintiff for the ground in question, the jury not having found upon all the interrogatories submitted to them by the court.

2. Did the placer patent necessarily include the lode mining claim location, unless such lode claim was known to appellant to exist at the time or before he applied for his patent? And is this question determinable in this action or was it conclusively adjudicated in the Land Office (Record p. 20).

3. Was it necessary that the owners of the Pay Streak mining claim should have filed any protest or adverse claim to the placer application of appellant (R., p. 27.)

The brief of appellant raises in this Court questions not urged below, viz:

4. There was no finding "that there was *any valuable mineral deposit* as a lead or lode known to exist to any one at the date of defendant's application for or receipt of patent" (Appellant's brief, p. 2).

5. Under no circumstances could the lode claimant take surface ground of more than 25 feet on each side of his lead.

Appellants are in error in stating (Brief, page 2) that the Chancellor approved a finding "that on the 14th day of April, 1887 (meaning 1878), defendant applied for * * * a patent from the Government." The finding of the jury was that the application was made April 14, 1878 (R., p. 13), but this was clearly an inadvertence and was set aside as contrary to the pleadings and proofs, the Chancellor finding the true date of the application for patent to be "the 14th day of December, 1878" (R., p. 14). This was the date adopted by the territorial Supreme Court. At page 27 of the record that court says: "It was found by the jury as a fact, and adopted and approved by the court, that the grantors of respondents, in April, 1878, and six months before appellant's application for a patent on the public mineral lands of the United States, discovered a vein or lode," &c. December 14, 1878, is the date of application alleged in the answer (R., p. 5).

Brief of the Argument for Respondent.

I.

The contention below by the appellants that the action was at law, and that therefore the court could not render judgment, the jury not having found upon all the interrogatories submitted to them, has been abandoned, the appellant presenting the case here "as an action in the nature of a bill in equity" (Brf., p. 1). It results that the court was at liberty to disregard the finding of the jury and follow its own judgment upon the evidence (Quinby *v.* Conlan, 104 U. S., 420–424).

II.

The real question is, what are the rights of the respondents in the Pay Streak lode tract, as it is described in the com-

plaint, notwithstanding the patent issued to the appellant for his placer tract confessedly includes said lode tract within its patented lines.

The force of the findings of facts as adopted in the Supreme Court of the Territory is to the effect that when the appellant (December 14, 1878) applied for a placer patent there was, and for more than seven months previously had been, within the lines of the placer tract as applied for not merely a known vein or lode bearing the precious metals, but a *duly located and subsisting vein or lode claim, prima facie* valid by reason of compliance by the locators and their successors with the provisions of the laws of the United States relating to mines and mining resources applicable thereto, and that said located vein or lode *claim* continued to be valid and subsisting at the date of the issuance of the patent on the placer application, and was so valid and subsisting and possessed and owned by the respondents at the commencement of this suit.

1st. A lode claim is property which by operation of law has become segregated from the mass of the public domain of which the locator or his successor in interest is the owner.

It is property, in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent.

Little Pittsburg M. Co. *v.* Amie M. Co., 17 Fed. Rep., 57.

Kinney *v.* Consolidated V. M. Co., 4 Sawyer, 382.

Forbes *v.* Gracey, 94 U. S., 762.

Belk *v.* Meagher, 104 U. S., 279.

Though the fee remains in the United States until patent issues, a regularly located vein or lode claim is a tract as completely withdrawn from the public domain as the fee is by a valid grant. Such a tract is as fully protected against appropriation, either by a third party or the United States,

as is a valid homestead or pre-emption entry. Hence a location or other attempted appropriation of lands actually covered at the time by another valid and subsisting location is void, and this not only against the prior locator, but all the world.

Belk *v.* Meagher, *supra.*

2d. A patent which purports to convey lands previously sold or reserved is so far void.

Polk's Lessee *v.* Wendell, 9 Cranch, 87.
Patterson *v.* Winn, 11 Wheat, 380.
Reichart *v.* Felps, 6 Wall., 160.
Best *v.* Polk, 18 *Id.*, 112.
Morton *v.* Nebraska, 21 *Id.*, 660.
Steel *v.* Smelting Co., 106 United States, 452.

Under these authorities and findings of facts, had this action been ejectment brought by Noyes, claiming the possession under a patent unencumbered by restrictions or qualifying proviso, the judgment would have been against him.

The defendant in such a case, pleading the ownership growing out of his prior lode location, must have been adjudged to have the better title.

Want of power to issue a patent may be shown in a court of law.

Sherman *v.* Buick, 93 U. S., 209–216.

3d. But the owner of placer ground held under the patent of the United States takes a title qualified and restricted as to lodes and lode claims which may be found within his boundaries. The law which authorizes the issuance of a patent to ground applied for as placer declares the instrument inoperative as to any known vein or lode, and as to any existing lode claim to which the applicants for patent have no right of possession (R. S., sec. 2333).

The construction of this statute was before the court in *Sullivan et al.* v. *Iron Silver Mining Co.*, 109 *U. S.*, 550.

The action was for recovery of possession of placer ground brought by the grantees of the patentees of the United States against one who had ousted the possession by entering upon and working a lode claim contained within the patented lines.

The defence as set up in the answer was that, at the time of the location, application, and patenting of the placer claim, a lode, vein or deposit "was known to exist and was claimed to exist within the boundaries and underneath the surface of said placer claim," and that this fact was known to the patentees at all of said times, but they failed to include said lode in their application. There was no allegation in the answer that there was a "*lode claim location*" made on the ground at any time before patent which issued March 11, 1879, but the allegation was that such lode location was made January 1, 1883.

The plaintiff demurred to the answer on the ground (principally) that it showed that neither defendants nor their grantees had discovered, located or recorded, any lode or vein at, or before, the date of the application for the placer patent, but did locate it long afterwards. The circuit court sustained the demurrer. In this court the contention of the placer claimants was, that "a vein or lode within the boundaries of a placer claim is not excepted from a patent for the placer claim, unless a claim for the vein or lode had previously been located."

The contention of the lode claimants on the contrary was, "that if the existence of a vein or lode is known to the applicant for a placer claim he must include in his application for the placer claim an application for the vein or lode claim in order to obtain any title to it."

This court reversed the judgment below, and remanded

the case, but under conditions that fairly indicate that, had the pleadings presented the issue of a lode claim duly located at the date of the placer application, the title of the lode claimant would have been sustained. The court below held that only *located claims* were such as by Sec. 2333 were excluded from the operation of placer patents and found against the defendant because his answer had not set up a known vein or lode answering that description (16 Fed. Rep., 829).

The question was again before this court in the case of Reynolds *v.* Iron Silver Mining Co. (116 U. S., 687). The facts in that case were that lying along and in contiguity with the patented lines of a lot of placer ground were two located lode claims, the vein from which, it was contended, on its dip, entered the placer tract. The defendant followed the vein, under the surface, into the placer limits, and this was the ouster, on account of which the action was brought. The finding in the circuit court was against the allegation that the vein belonging to the lode location entered the placer limits; it being held, for the purpose of determining that particular question, that at the point where the said vein left the limits of the located lode claim the line of that claim was an *end*, and not a side line, that the lode claimants could not therefore follow it of right as appertaining to their own location and in following it into the placer tract became trespassers. That a vein or load, however, existed under the placer tract, and was known to exist as well to the patentees as to others when patent was applied for, was admitted. It does not appear that there was any actual entry upon the surface of the placer tract by the lode claimants. The circuit court, on the ground that the defendants had shown no right or interest in the lode, or any intention to claim the same according to local laws and the acts of Congress, and were naked trespassers, gave judgment for the plaintiffs, holding

that while the lode was not mentioned in the patent, yet for the purposes of the suit the title to it was conferred by that instrument. This court, in reversing that judgment and ordering the case back for a new trial, said (p. 697–8):

"We are of opinion that Congress meant that lodes and veins known to exist when the patent was asked for should be excluded from the grant as much as if they were described in clear terms. It was not intended to remit the question of their title to be raised by some one who had or might get a better title, but to assert that no title passed by the patent in such case from the United States. It remains in the United States at the time of the issuing of the patent, and in such case it does not pass to the patentee. He takes his surface land and his placer mine, and such lodes or veins of mineral matter within it as were unknown, but to such as were known to exist he gets by that patent no right whatever. The title remaining in his grantor, the United States, to this vein, the existence of which was known, he has no such interest in it as authorizes him to disturb any one else in the peaceable possession and mining of that vein. When it is once shown that the vein was known to exist at the time he acquired title to the placer, it is shown that he acquired no title or interest in that vein by his patent.

"Whether the defendant has title, or is a mere trespasser, it is certain that he is in possession, and that is a sufficient defence against one who has no title at all, and never had any."

With respect to the force or definition of the words "*known to exist*," the court said "whether this knowledge must be traced to the applicant for the patent, or whether it is sufficient that it was generally known, and what kind of evidence is necessary to prove this knowledge, we need not here inquire. It is perhaps better that these questions should be decided as they arise" (116 U. S., 696–7).

The lamented Chief-Justice dissented, but upon the ground that although the vein or lode was known to exist when the

placer patent issued "it had not then, nor has it now, been located as a vein or lode claim." That "by the express provision of Rev. Stat., § 2333, the patent, under which the company holds, gives it no right to the possession of any vein or lode *claim* within the boundaries of the placer patent, but as yet no such *claim* exists."

There was a new trial below and judgment for the defendants from which a writ of error was prosecuted to this court. At the present term (January 23, 1888), the case being "The Iron Silver Mining Company, plaintiff in error, *v.* Joseph Reynolds and John D. Morrissey (not yet reported), the judgment was reversed and the case again remanded for a new trial. The reversal was upon two grounds, one which is of no interest as affecting the discussion of the questions here arising; the other because of error in instructing the jury that an application for a patent made with *intent* to acquire title to a lode or vein which *may* exist would be equivalent in force and effect, as voiding the patent *pro tanto*, to proved knowledge of the existence of a lode or vein. The decision tends towards the final solution of the principal questions growing out of the peculiar provisions of said Sec. 2333 only in its repetition and affirmance of the positions taken by the court in the opinion first delivered in the case.

The controlling questions which, upon second consideration, stand decided, are:

(*a.*) That lodes and veins known to exist when the patent is asked for, and which are not embraced by the application, are excluded from the grant evidenced by the patent as effectually as if described and excepted in express terms. In such cases no title to the lode or vein passes by the patent from the United States.

(*b.*) That this is true as to veins or lodes known to exist, though, at the date of the application for patent, such vein or lode is not possessed, claimed or located by any one.

(*c.*) That one having or taking possession of such known vein or lode, whether as a mere intruder or as an intending purchaser under the mineral laws has, with respect to it, the same rights and privileges that he would have had had no placer patent included it within its boundaries.

(*d.*) And as to questions of what kind of evidence is necessary and sufficient to prove the knowledge required by the statute they should be decided as they arise.

It is to be noted that in neither of the cases involving the construction of Section 2333 has the existence of a lode claim location at date of application for patent been present for decision, but that the argument and reasoning in Sullivan *v.* Iron Silver Mining Co., and in Reynolds *v.* the same company, *supra*, have, both in the trial court and here, proceeded upon the theory that such a location would beyond question fill the description of a vein or lode known to exist, and work the exclusion contemplated by the statute.

III.

The remaining questions discussed below, or raised here for the first time, are incidental, not fundamental.

The contention that the placer patent must be considered to include a known lode, unless *personal* knowledge of its existence can be brought *directly* home to the grantee named therein, does violence to the plain import of the language of Sec. 2333. "Known to exist" and "is not known" are words of general import. To add, for the purpose of construction, such qualifying words as would make the section conform to appellant's construction is violative of the canon of construction that "there is no authority to import a word into a statute in order to change its meaning."

Newhall *v.* Sanger, 92 U. S., 765.

The construction contended for would refer the whole interest of the United States in lodes lying in the vicinity of placer ground to the decision of the interest or cupidity of a single claimant whose assertion of want of personal knowledge would be the evidence of his right.

No such construction of the law was demanded below. On the contrary, the defendant (appellant) asked the court to instruct—

"That if there was no vein or lode known to defendant, or which could have been known to him, by reasonable examination of the premises, to exist or be on said premises when the defendant applied for and obtained his patent, then his patent would convey him a title to any vein or lode therein" (R., p. 10).

The part of the above embraced in the words, *or which could have been known to him by reasonable examination of the premises*," &c., was in substance put to the jury in the second interrogatory, and court and jury found that the Pay Streak lode existed, and its existence "could have been ascertained on or prior to the 14th day of December, 1878, by a person examining the ground with an honest endeavor to ascertain if it contained any such vein or lode" (R., p. 11).

But this is not the case of a lode known to exist, but of a lode claim *location*, with its boundary stakes set, its notice posted on the ground, and spread upon the proper county records, knowledge of which, as found by the court below, the law imputes, and respecting which the appellant has put no personal denial in the record.

"The manner of recording" lode claims, among other things, may be prescribed by the laws of the State or Territory where situated (R. S., sec. 2324).

The laws of Montana Territory (Rev. Stats., 1879, p. 590) prescribe:

"SEC. 873. Any person or persons who shall hereafter discover any mining claim upon any vein or lode bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, shall, within twenty days thereafter, make and file for record in the office of the recorder of the county in which said discovery is made, a declaratory statement thereof, in writing, on oath, before some person authorized by law to administer oaths, describing such claim in the manner provided by the laws of the United States."

There is a finding that there was due performance of these requirements by the discoverers of the Pay Streak location.

The suggestion, that respondents lost any rights by failing to interpose an adverse claim to the placer application for patent, ignores the provision of Sec. 2333, which makes the failure of a placer applicant to also include any known vein in his *application* "a conclusive declaration" that he has "no right of possession of the vein or lode claim."

Undoubtedly had the appellant embraced both the lode claim and the placer claim in his application, and exhibited both on his plat and in his published notice for patent, the respondents must have tried conclusions with him by adverse proceedings. An application of such character would have been a declaration of right of possession and intention to claim the lode. The application as made, the law itself, constitutes the equivalent of a disclaimer as to the vein or lode claim.

The contention that the lode claimant, because of the contiguity of patented placer ground, is restricted to 25 feet of surface on each side of the lead or vein is not sustainable. The provision of the law (Sec. 2333 R. S.) with respect to the apportionment of the ground for the purpose of determining *price*, where the same person or association applies for both a placer and lode claim, favors such person or as-

sociation by allowing them, if they so elect, to take with the lode the narrowest area of surface permitted to lode claimants, viz., 25 feet of surface on each side of the vein; but as to all others the provisions of the laws of the United States are that "no claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than 25 feet on each side of the middle of the vein at the surface" (R. S., Sec. 2320). By Sec. 2324 the State or Territory in which mining lands exist may make regulations not in conflict with the laws of the United States "governing the location" of mining claims.

The law of the Territory of Montana in force at the date of the discovery of the Pay Streak lode authorized locators to take surface ground to the extent of not more than 300 feet on each side from the centre of the lode or vein (Laws of Montana, Rev. Stats. 1879, Sec. 875). But the further sufficient answer is that, as before pointed out, the Pay Streak claim was a property having a width of three hundred feet on each side of its lead or vein, and to that extent duly segregated from the mass of the public domain when the placer application was made.

Appellant strongly contends here that there was manifest error below, for the reason that the court did not find as a fact "that there was any *valuable mineral deposit* as a lead or lode known to exist to any one at the date of defendant's application" (Brf., p. 2, par. 3).

The known vein or lode claim that by Sec. 2333 is excepted from a placer patent is such as is described in Sec. 2320. The mining claims there described are those "upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits" having not more than a specified length or width, and within whose limits there must have been "the discovery of the vein or lode."

These are the descriptive tests which the laws of the United States set up.

How valuable a patentable deposit must be is not prescribed, but the claimant's good faith toward the United States in that behalf is tested by the requirement that he shall each year expend upon his claim a sum about equal to the purchase price, viz., one hundred dollars (Sec. 2324), and before patent issues not less than five hundred dollars (Sec. 2325).

The ultimate judgment upon the sufficiency of the compliance with law by a locator is left with the land department.

It may be conceded that it devolved upon the respondents, as plaintiffs in the trial court, to show themselves possessed of a lode location, *prima facie*, valid under the law. This the district and supreme court of the Territory, with all the evidence before them, found had been done; the latter court saying of the Pay Streak claim, "It was a perfect lode claim location, and so continued in full force and effect at the time when the appellant applied for and obtained a placer patent for the same ground" (Record, p. 27). The record does not show that appellant offered in the court below any evidence in rebuttal of the plaintiffs' *prima facie* showing, nor that he requested finding, raising there the questions particularly urged here, or made objection or took exception to any defects in the findings. This was necessary in order to entitle them to consideration in the supreme court of the Territory (Code Civ. Proc., M. T., Sec. 270, p. 89). The rule of this court is that nothing which occurred in the progress of the trial can be assigned for error here, unless it was brought to the attention of the court below and passed upon directly or indirectly.

Wood *v.* Weimer, 104 U. S., 795.

An objection not taken in the court below cannot be considered here.

Wilson *v.* McNamee, 102 U. S., 572.
Edwards *v.* Elliot, 21 Wall., 532.

The respondents respectfully submit that the decree below should be affirmed.

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Attorney for Respondents.